NO. 91-494

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FULL GOSPEL PORTLAND CHURCH, et al.,

Petitioners,

v,

RICHARD THORNBURGH, et al.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Counsel of Record: JAMES H. LESAR
918 F Street, N.W.,
Room #509
Washington, D.C. 20004
Phone: (202) 393-1921

Susan Au Allen
PAUL SHEARMAN ALLEN & ASSOCIATES,
1625 K Street, N.W. #380
Washington, D.C. 20006
Phone: (202) 637-2777

Counsel for Petitioners

DATED: SEPTEMBER 16, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the District of Columbia erred in ruling that the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(3), does not permit an award of attorney fees for the visa and deportation proceedings of plaintiff Hae-Sook Kim.

2. Whether the United States Court of Appeals for the District of Columbia erred in ruling that "civil action" EAJA, 28 U.S.C. § 2412(D)(1)(A) does not permit an award of attorney fees for pre-litigation administrative proceedings which were intimately tied to resolution of the judicial action.

3. Whether the United States Court of Appeals for the District of Columbia erred in ruling that attorney fees for post-litigation proceedings necessary to secure

the relief sought in the civil action were not authorized under this Court's decision in Sullivan v. Hudson, 109 S. Ct. 2248 (1989).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FULL GOSPEL PORTLAND CHURCH, et al.,

Petitioners,

v,

RICHARD THORNBURGH, et al.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, the Full Gospel Portland Church and Hae Sook Kim, respectfully pray that a writ of certiorari issue to review the March 12, 1990 judgment and opinion of the United States Court of Appeals for the District of Columbia, and

the June 7, 1990 denial of Petitioners' Petition for Rehearing and Suggestion of Rehearing En Banc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia dated October 4, 1987, including the dissenting opinion of Circuit Judge Ruth Bader Ginsburg, is reported at 927 F.2d 628 (D.C. Cir.1991). The opinion and judgment are set forth in the appendix at pages 3a and 1a, respectively.

The denials of petitioners' petition for rehearing and suggestion for rehearing en banc, dated June 7, 1991, are set forth in the appendix at pages 35a and 33a, respectively.

The October 4, 1989 Memorandum of the District Court awarding attorneys' fees

and costs is set forth in the appendix at page 40a. The order of even date which accompanied the District Court's Memorandum is reprinted in the appendix at page 47a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on March 12, 1991. On June 7, 1991, the Court of Appeals denied petitioners Petition for Rehearing and Suggestion of Rehearing En Banc.

On August 28, 1991, Chief Justice William H. Rehnquist extended the time within which to file a petition for certiorari to and including September 16, 1991.

This Court has jurisdiction to review the judgment of the District of Columbia Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Equal Access to Justice Act is codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412. The text of these statutes is reproduced in the appendix at pages 144a-156a.

STATEMENT OF THE CASE

A. Pre-litigation Administrative Proceedings

Petitioner Hae-Sook Kim ("Mrs. Kim") entered the United States on August 18, 1982 as the spouse of a treaty trader from Korea. The Department of Labor issued a labor certification to plaintiff Full Gospel Portland Church ("Full Gospel") to

employ Mrs. Kim as a piano teacher/accompanist, and defendant INS approved a third preference immigrant visa petition filed on Mrs. Kim's behalf by Full Gospel. This made Mrs. Kim eligible under the Immigration and Nationality Act ("the INA") for adjustment of status to that of an immigrant. On October 7, 1985, Mrs. Kim applied for adjustment of status with the INS office at Portland, Oregon ("INS Portland").

INS Portland accepted Mrs. Kim's application[1] and gave her permission to work. In January 1986, Mrs. Kim began work as a piano teacher/accompanist with Full Gospel, which paid her salary and

---

[1]Although the INS denied her application on May 5,1987 and initiated deportation proceedings against her, the INS eventually reversed that decision as a result of her lawsuit. On May 8, 1989, it approved her application.

withheld taxes from her pay. Nine months after it had approved Mrs. Kim's third preference petition, INS Portland notified Full Gospel of its intent to revoke the approval. On September 3, 1986, INS Portland revoked the approval. Full Gospel then appealed the revocation to the INS Administrative Appeals Unit ("the AAU") in Washington, D.C. Oregon counsel for Full Gospel and Mrs. Kim supplied evidence showing that: (1) Mrs. Kim's college education was equivalent to a U.S. Bachelor's degree, which is the usual minimal requirement for entry into the position occupied by Mrs. Kim at Full Gospel's music school; (2) that Full Gospel had a music education program and maintained student attendance records; (3) that Mrs. Kim was paid for her employment as a piano teacher at Full Gospel; and (4)

that Full Gospel had a sound financial condition. Despite this showing, the AAU nevertheless sustained the revocation on March 30, 1987, stating that INS Portland was correct in finding the position Mrs. Kim occupied was not a professional position; that she was not a professional; and that the job offered her was not bona fide. The AAU also added a new objection, claiming that Full Gospel did not prove that it had the financial ability to pay Mrs. Kim. Since this claim had never been made before, Full Gospel had no opportunity to respond to it.

Subsequent to the decision of the AAU affirming revocation of the approval of Mrs. Kim's third visa preference petition, INS Portland denied her application for adjustment of status on the ground that no petition had been approved for her, and

withdrew the employment authorization previously given to her. It issued a final notice that Mrs. Kim and her family must leave the United States on or before September 7, 1987 or they would be placed in deportation proceedings.

After Mrs. Kim received notice of INS' intent to deport her and her family ("the Kims"), Full Gospel retained new counsel ("counsel") from Washington, D.C. On September 30, 1987, Full Gospel's new counsel filed a Motion to Reopen and Reconsider the Third Preference Petition ("Motion")[2] and a Sixth Preference Petition ("Petition") with INS Portland. INS Portland did not act on them, but instead commenced

---

[2]The Motion was filed with $110 check for the filing fee. On October 14, 1987, INS acknowledged receipt of the Motion on October 9th but returned the check to Counsel with an instruction to send $50 only. Counsel did so immediately.

deportation proceedings against the Kims.

On November 10, 1987 INS Portland informed Mrs. Kim's Oregon counsel that it was denying Mrs. Kim's request for an extension of her departure date. INS Portland acknowledged receipt of Mrs. Kim's Motion on Octcber 22, 1987 and her Petition on September 20 (sic), 1987, but it advised that there was no likelihood that the Motion would be granted and little likelihood that Mrs. Kim would obtain immigrant status in the immediate future through the Petition.

On February 18, 1988, eleven days before Mrs. Kim's deportation hearing, Counsel called INS District Counsel Solmonson, who would represent INS at the hearing, and discovered that INS could not find the Petition in Mrs. Kim's file and

that no action had been taken on the Motion.

On February 26, 1988, Counsel called INS Portland to inquire if the Petition had been adjudicated but no one answered the phone. Counsel then called the AAU and inquired if it had received the Motion from INS Portland. It had not. As a result, plaintiffs brought suit in District Court on February 26, 1988.

On February 29, 1989, within one minute of Mrs. Kim's deportation hearing, INS District Counsel Solmonson handed Counsel a decision denying the Petition. The decision was dated February 25, 1989, the day before plaintiffs filed suit.

The Immigration Judge denied Mrs. Kim's motion to adjourn the deportation hearing because she did not have an approved petition. He found Mrs. Kim and her family

deportable and gave them 30 days to leave the United States, else they would be deported. Mrs. Kim appealed the deportation order to the Board of Immigration Appeals.

B. Proceedings in District Court--Merits Phase

The Government moved to dismiss plaintiffs' civil action for lack of jurisdiction. Plaintiffs countered with a motion for summary judgment.

The District Court held that it had jurisdiction because the INS was effectively starving the Kims out of the country by failing to act on their Motion and Petition and by prohibiting Mrs. Kim from working.

On the merits of the visa petition, the court found, inter alia, that Full Gospel's offer was a professional one, that

Mrs. Kim had professional qualifications, that Full Gospel had paid Mrs. Kim's salary and withheld taxes, and that Full Gospel's 1985 financial statement showed it had the ability to pay her. The court found that INS' revocation of Mrs. Kim's approved third preference petition was not supported by substantial evidence or law and was clearly erroneous. The court also found that INS' denial of the sixth preference petition was unjustified, clearly unreasonable, and an abuse of discretion.

On December 15, 1988, the Government noticed an appeal to the United States Court of Appeals for the District of Columbia. On May 4, 1989, it moved to dismiss the appeal.

On December 21, 1988 the AAU notified plaintiffs that Mrs. Kim's third and sixth preference petitions had been approved;

that the records were being returned to INS Portland, which would issue notices of approval; and that further inquiries should be addressed to that office.

For the next four months plaintiffs made numerous attempts to obtain the notices of approval and adjustment of status by telephone calls, letters, and personal visits to the AAU, the office of INS Portland, the Office of Immigration Judge and the Board of Immigration Appeals.

Finally, on May 8, 1988, the INS approved Mrs. Kim's application for adjustment of status and gave her permission to work.

C. District Court's Ruling on Application for Attorney Fees and Costs

On application by plaintiffs, the District Court ruled that plaintiffs were entitled to an award of fees and costs.

With respect to defendants' contention

that under the EAJA no fees may be awarded for administrative time, the court held that:

> There can be no question but that proceedings before the INS in this instance were adversary as they involved a plaintiff's right to continue to reside and work in the United States. EAJA contemplates award for all reasonable administrative work of an adversary character after the agency has taken a position that is not "substantially justified" affecting the basic issue at stake.

Full Gospel Portland Church v. Thornburgh, 730 F. Supp. 441, 442 (D.D.C.1989), citing Hudson v. Secretary of Health and Human Services, 839 F.2d 1453, 1459-60 (11th Cir. 1988). The court therefore awarded plaintiffs fees for 119.0 hours of administrative time, as well as for 139.3 hours of litigation time.

D. Decision of the Court of Appeals

The Court of Appeals held that the fees

which the district court had awarded for the pre-litigation visa proceedings, and for the deportation hearing, were not allowable under "judicial review" EAJA, 28 U.S.C. § 2412(3), which provides that the court shall award fees against the government to "a prevailing party in any action for judicial review of an adversary adjudication as defined in [5 U.S.C. § 504 (b)(1)(C)]." Relying on its prior decision in St. Louis Fuel and Supply Co. v. FERC, 890 F.2d 446 (D.C.Cir.1989), the D.C. Circuit construed § 504(b)(1)(C)'s proviso that fees may be recovered only if the challenged administrative action constitutes "an adjudication under [5 U.S.C.] section 554" as meaning "governed by section 554." Because this Court held in Marcello v. Bonds, 349 U.S. 302, 310 (1955), that Congress had specifically exempted INS

proceedings from the APA's hearing provisions, including section 554, it reasoned that "fees may not be awarded for representation in deportation proceedings or on judicial review if the underlying action is governed by the procedural requirements of the Immigration and Naturalization Act . . . ." Full Gospel Portland Church v. Thornburgh, 927 F.2d 628, 630-631 (1991)

The Court of Appeals also rejected Full Gospel's alternative contention that it was eligible for fees for the administrative proceedings under civil action EAJA because this provision, 28 U.S.C. § 2412(d)(1)(A), contains no "adversary adjudication" limitation. Id., at 631.

Finally, the Court of Appeals rejected Full Gospel's contention that post-litigation fees fall into a discrete category authorized under Sullivan v. Hudson, 490 U.S.

877 (1989). Id. However, Judge Ruth Bader Ginsburg dissented as to this issue. Id., 633-635.

REASONS FOR GRANTING THE WRIT

POINT I

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT THAT THE EQUAL ACCESS TO JUSTICE ACT DOES NOT APPLY TO IMMIGRATION VISA OR DEPORTATION PROCEEDINGS IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The decision of the United States Court of Appeals for the District of Columbia holding that the EAJA does not apply to immigration visa or deportation hearings is in direct contradiction to the holding of

the United States Court of Appeals for the Ninth Circuit in Escobar Ruiz v. I.N.S., 787 F.2d 1294 (9th Cir.1986)("Escobar Ruiz I"), reh'd denied, 813 F.2d 283 (9th Cir. 1987)("Escobar Ruiz II"), aff'd 838 F.2d 1020 (9th Cir.1988)(en banc)("Escobar-Ruiz III"). In the Escobar Ruiz case, the Ninth Circuit held that immigration deportation proceedings are "adversary adjudications" as contemplated by 5 U.S.C. § 504(A)(1), and are the very kind of proceedings with respect to which EAJA attorney fee awards were to serve as a deterrent to governmental abuse. In direct contradiction to this holding, the D.C. Circuit held in this &2case that immigration visa or deportation proceedings are not "adversary adjudications because they do not involve adjudications "under section 554" of the Administrative Procedure Act. Departing from the

the landmark Escobar Ruiz decisions, which defined "under" as meaning "as defined by" or "under the meaning of," the D.C. Circuit has defined "under" as meaning "'governed by APA section 554.'" Full Gospel, 927 at 630, quoting St. Louis Fuel and Supply Co. v. FERC, 890 F.2d 446, 451 (D.C.Cir.1989) (emphasis added by Full Gospel).

In addition to considering the statutory wording, the Ninth Circuit conducted a detailed examination of the EAJA's legislative history and statutory purpose. In contrast with the wooden and mechanistic interpretation adopted by the D.C. Circuit, the Ninth Circuit concluded that the legislative history and purpose of the EAJA supported a more flexible interpretation of "under section 554."

The Ninth Circuit noted that in its joint explanatory statement, the conference

committee on the original EAJA had declared that the statute "'defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise." Escobar Ruiz III, 838 F.2d at 1023, quoting H.R.Conf.Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980)(emphasis added by Escobar Ruiz). It then cited cases in which other circuits had followed the "defined under" interpretation of section 504. Id. at 1024. And it quoted the commentary on the model rules for agency implementation of the EAJA issued by the Administrative Conference of the United States, which urged that "considering the purposes of the EAJA, questions of its coverage should turn on substance--the fact that a party has endured the burden and expense of a formal

hearing--rather than technicalities." Id., citing 46 Fed.Reg. 32900 (1981).

As to the purposes of the EAJA, the Ninth Circuit quoted statements from its legislative history that it rested on the premise that a party who litigates an issue against the Government represents not only his own interest, but is also refining and formulating public policy. Id. at 1025, citing H.R.Rep.Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980). The statute's primary purpose, said the Ninth Circuit, "is 'to increase the accessibility to justice--in administrative proceedings and civil actions.'" Id. at 1026, quoting H.R. Rep.No. 120, 99th Cong., 1st Sess.,pt. 1, at 8 (1985).

Having considered the legislative purposes, the Ninth Circuit concluded that they allowing fee awards in deportation

tion prooceedings "would unquestionably advance the purposes underlying the EAJA." Id.

Like the D.C. Circuit, the Third and Eleventh Circuits have also rendered decisions in conflict with Escobar Ruiz. See Ardestani v. United States Dept. of Justice, INS, 904 F.2d 1505, 1509-13 (11th Cir.1990), cert. granted, 113 L. Ed.2d 212 (1991); Clarke v. INS, 904 F.2d 172, 174-178 (3d Cir.1990). Ardestani, however, was a split decision, with a vigorous dissent by Judge Pittman, who urged adoption of the holding and reasoning of Escobar-Ruiz.

In short, the federal circuits are badly and irrevocably split on the issue of whether immigration deportation proceedings are covered by the EAJA. This Court has recognized this division of opinion and the importance of the issue by granting certio-

rari in the Ardestani case. It should also grant certiorari in this case.

POINT II

THE D.C. CIRCUIT'S DENIAL OF EAJA ATTORNEY FEES FOR PRE-LITIGATION ADMINISTRATIVE PROCEEDINGS WHICH WERE INTIMATELY TIED TO RESOLUTION OF THE JUDICIAL ACTION IS INCONSISTENT WITH THIS COURT'S DECISION IN SULLIVAN V. HUDSON, 490 U.S. 877 (1989) AND UNDERCUTS THE GOAL OF THE EAJA

In Sullivan v. Hudson, 490 U.S. 877, 109 S.Ct. 2248, 104 L.Ed.2d 941 (1989), this Court held that even though social security benefit proceedings are not "adversarial" under § 504 of the APA, remand proceedings under the Social Security Act are so intimately connected with the judicial proceedings as to be considered part of the "civil action," thus making fees available

under 28 U.S.C. § 2412(d)(1)(a) which authorizes a district court to award to a prevailing party other than the United States "fees and other expenses . . . incurred by that party in any civil action. . . ." 28 U.S.C. § 2412(d)(1)(A)(emphasis added).

Although Hudson dealt with administrative proceedings which ensued a judicial remand, Hudson uses broad language to describe the nexus which will pull administrative time within the scope of fees incurred in a "civil action." The Court states, for example, that:

> Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.

104 L.Ed.2d at 952 (emphasis added). Obviously, administrative proceedings which precede a judicial action may be as "intimately tied" to its resolution as post-judicial remand proceedings, if not more so. Indeed, such pre-litigation proceedings may be mandatory, as where it is necessary for a party to exhaust administive remedies before proceeding to court.

The decision of the D.C. Circuit in this case ignores the principle established by Hudson and the legislative history and purpose of the EAJA. In limiting administrative EAJA to "adversary adjudications," Congress sought to restrict its scope

> to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or de-defending that interest because of the time and expense involved in pursuing administrative remedies. *** In these situations,

> in order to insure that individuals will actively seek to protect their rights vis-a-vis the government, they must have the opportunity to recover the costs of litigating. An administrative remedy in these circumstances cannot be truly effective unless a prevailing party is made whole.

H.Rep.No. 96-1418, 96th Cong., 2d Sess. 6 (1980).

Given this concern with the inability of parties wronged by government action to bear the legal costs necessary to challenge such action, it hardly stands to reason that it intended to "ma[ke] whole" those prevailing parties who incurred the costs of administrative proceedings but not those who incurred the costs of both administrative and judicial proceedings. Far from removing "any barrier," the obvious effect of such an anomaly would be to severely undercut the incentive of attorneys to represent clients in such circumstances

because they might receive only half a loaf, or less, even if their clients prevailed in the judicial action. Thus, the decision of the D.C. Circuit ignores what the this Court said in Hudson: "we find it difficult to ascribe to Congress an intent to throw the [prevailing party] a lifeline that it knew was a foot too short." 109 S.Ct. at 2256, 104 L.Ed.2d at 954.

The D.C. Circuit also incorrectly stated that Full Gospel's interpretation of civil action EAJA "would override 28 U.S.C. § 2412(d)(3),the judicial review EAJA provision which allows fees only for adversary agency adjudications to parties who eventually prevail in court." Full Gospel, 927 F.2d at 631 (emphasis in original). To the contrary, Full Gospel's interpretation of civil action EAJA comple-

ments rather than supplants judicial review EAJA. If the administrative adjudication is not adversary, then the plaintiff who prevails in the civil action must make a showing not required under judicial review EAJA: he must show that the administrative proceedings were intimately related to the resolution of the civil action.

POINT III

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA THAT PETITIONERS WERE NOT ENTITLED TO ATTORNEY FEES FOR POST-LITIGATION PROCEEDINGS NECESSARY TO SECURE THE RELIEF SOUGHT IN THE CIVIL ACTION IS IN CONFLICT WITH THIS COURT'S DECISION IN SULLIVAN V. HUDSON, 490 U.S. 877 (1989), AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT IN POLGREEN V. MORRIS, 911 F.2d 527 (11th Cir.1990).

In Sullivan v. Hudson, 490 U.S. 877 (1989), this Court held that civil action EAJA permits a federal court to award a prevailing Social Security Act claimant fees for representation at the administrative level following a court-ordered remand. In a split decision, the D.C. Circuit in this case held that Hudson does not apply where there has not been a remand by the reviewing court and "'detailed provisions for the transfer of proceedings from the courts to the [agency],'" which would implicate 'a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the [APA]. . . .'" 927

F.2d at 632, quoting Hudson, 109 S.Ct. at 2254.

In her dissent, Judge Ruth Bader Ginsburg argued that Hudson "appl[ied] a general principle in a particular instance; in the Court's words, civil action EAJA encompasses administrative proceedings that are "'intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees.'" 927 F.2d at 633, (Ginsburg, J., dissenting), quoting Hudson. The pivotal question, in her view, was not the unusual statutory scheme involved in Hudson, or the existence of a remand order, but "whether 'the administrative proceedings on remand . . . were "crucial to the vindication of [the private party's] rights."'" Id., quoting Hudson 490 U.S. at 889 (quoting Pennsylvania v. Delaware Val-

ley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986).

On the facts of the instant case, Judge Ginsburg found that the "follow-up processing at INS had "complemented the district court's judgment, served to effectuate the court's mandate, and ultimately vindicated the rights of the party who prevailed in court." Id., 927 F.2d at 634, citing Hudson, 490 U.S. at 890.

The D.C. Circuit's opinion on this issue is also inconsistent with the decision of the Eleventh Circuit in Polgreen v. Morris, 911 F.2d 527, 536 n. 10 (11th Cir. 1990) (holding that "[t]he test espoused by the Supreme Court is not how similar the statute governing a particular proceeding is to the Social Security Act, but rather, whether the administrative proceedings are

intimately tied to the resolution of the judicial action.").

In order to ensure uniformity in the application of Hudson by federal courts on the issue of the availability of EAJA fees in post-judicial action administrative proceedings not involving the Social Security Act or a remand order, this Court should grant certiorari.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

James H. Lesar #114413
918 F Street, N.W. #509
Washington, D.C. 20004
Phone: (202) 393-1921

Counsel of Record

Susan Au Allen
PAUL SHEARMAN ALLEN &
ASSOCIATES, #380
1625 K Street, N.W.
Washington, D.C. 20006
Phone: (202) 637-2777

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA COURT

No. 90-5061 September Term, 1990

Full Gospel Portland Church, et al.

v.

Richard Thornburgh, et al.,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: RUTH B. GINSBURG, SILBERMAN AND SENTELLE, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the order of the District Court awarding attorney fees and appealed from in this cause is hereby affirmed in part and

reversed in part, in accordance with
Opinion of the Court filed herein
date.

Per Curiam

FOR THE COURT

CONSTANCE L. DUPRE, C

Date: March 12, 1991

Opinion Per Curiam

Opinion concurring in part and dissen
in part filed by Circuit Judge Ruth
Ginsburg.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 19, 1990
Decided March 12, 1991

No. 90-5061

FULL GOSPEL PORTLAND CHURCH, et al.

v.

RICHARD THORNBURGH, et al.,
Appellants

Appeal from the United States District Court
For the District of Columbia

(Civil Action No. 88-00521)

William Kanter, Attorney, Department of Justice, with whom Stuart M. Gerson, Assistant Attorney General, Jay B. Stephens, United States Attorney, Michael Jay Singer and John S. Koppel, Attorney's, Department of Justice, were on the brief, for appellants.

James H. Lesar with whom Susan Au Allen and Paul shearman Allen were on the brief, for appellees.

Before: Ruth B. Ginsburg, Silberman, Sentelle, Circuit Judges.

Opinion for the court filed Per Curia

Opinion concurring in principal part, dissenting as to fees for INS process following the district court's decisi filed by Circuit Judge Ruth B. Ginsbur

Per Curiam: This appeal concerns application for attorney fees, expens and costs under the Equal Access Justice Act ("EAJA), 28 U.S.C. Sec 24 Plaintiffs-appellees Full Gospel Portl Church and Hae-Sook Kim (Collective "Full Gospel"), through proceedings in district court, gained an injunct preventing deportation of Kim established her eligibility to remain this country. After entering judgment favor of Full Gospel on the merits, district court granted Full Gospe application for fees covering

administrative and court proceedings. The government on appeal contests the fees award to the extent that it compensates counsel for administrative proceedings before the Immigration and Naturalization Service ("INS") (119) hours. We hold that Full Gospel may not recover fees for the administrative proceedings.

I.

Hae-Sook Kim worked as a choir director, piano teacher, and accompanist at Full Gospel Portland Church. In late 1986 and early 1987, INS revoked Kim's "third preference" immigration status, withdrew her authorization to work, and ordered her to leave the country or face deportation proceedings. Full Gospel, represented by its Washington, D.C. counsel, Susan Au Allen, moved INS to reconsider its decision and filed a "sixth preference"

petition with the Service.[1]

INS nonetheless commenced deportation proceedings in November 1987. In the ensuing weeks, Full Gospel repeatedly requested a response from INS to its motion and petition. At the end of February 1988, when it became apparent that full Gospel would receive no INS response prior to the time set for Kim's deportation hearing, Full Gospel commenced its litigation in the district court.

The court entered summary judgment for Full Gospel, ruling that the revocation of Kim's third preference petition and a denial of her sixth preference petition were arbitrary and capricious. The court ordered INS to abide by the court's

---

[1] The Immigration and Naturalization Act of 1952 authorizes "third preference" status for (inter alia) "qualified immigrants who are members of the professions...and whose services in the professions ...are sought by an employer in the United States."8

determinations of Kim's qualification forthird and sixth preference visas "in any matter relating to adjustment of Ms. Kim's status..: Memorandum and Order, Full Gospel Portland Church v. Thornburgh, Order at 2 (D.D.C. Oct. 17, 1988) ("Merits Op."), reprinted in Joint Appendix ("J.A>") at 247. Full Gospel promptly moved for attorney fees under EAJA, both for the district court litigation and for all INS proceedings. See 28 U.S.C. Sub Sec. 2412(d)(1)A) (called, in this opinion, "civil action EAJA") and 2412(d)(3) (herein called "judicial review EAJA").

In May 1989, after further efforts by Full Gospel's attorney, INS approved Kim's application for adjustment of status and gave her permission to work. In October 1989, upon determining that the government's decision to deport was not

"substantially justified," the district court awarded Full Gospel fees for both the litigation and the administrative proceedings. Memorandum and Order, Full Gospel Portland Church v. Thornburgh (D.D.C. Oct. 4, 1989) ("Fees Op."), reprinted in J.A. at 272.

The government appeals the fees covering the pre- and post-litigation administrative proceedings ($12,334.79). In considering whether a fee award for the administrative proceedings is proper we distinguish between the pre-litigation visa proceedings and the deportation hearing (106 hours), and the post-litigation efforts to adjust Kim's status

---

U.S.C. Sec 1153(a)(3). Sixth preference status extends "to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." 8 U.S.C. Sec 1153(a)(6).

to that of a permanent resident (13 hours). We conclude, however, that neither judicial review EAJA nor civil action EAJA entitles Full Gospel to any fees in either the pre-or post-litigation proceedings.

II.

The district court awarded fees for the pre-litigation visa proceedings, and for the deportation hearing, under judicial review EAJA. Section 2412(d)(3) instructs the court to award fees against the government "to a prevailing party in any action for judicial review of an adversary adjudication, as defined in [5 U.S.C. Sec 504(b)(1)(C)]." (Emphasis added.) Full Gospel is not entitled to fees under judicial review EAJA. Our decision in St. Louis Fuel and Supply Co. v. FERC, 890 F.2d 446 (D.C. Cir.1989)-issued about six

weeks after the district court's fees opinion-interpreted strictly section 504(b)(1)(C)'s stipulation that fees may be recovered only if the challenged administrative action constituted "an adjudication under [5 U.S.C.] section 554." The words "under section 554," we held. mean "governed by APA section 554," 890 F.2d at 451 (emphasis added_, and thus fees are not available in "adjudications that Congress did not subject to [APA section 554]." Id.[2] The Supreme Court has held that Congress specifically exempted INS proceedings from the APA's hearing provisions (including section 554). See Marcello v. Bonds, 349 U.S. 302, 310 (1955). Accordingly, fees may not be

[2] The fees requested in St. Louis Fuel were for the administrative proceedings before the agency, not for the judicial review of the agency action, but the barrier "under section 554" applies equally to both proceedings.

awarded for representation in deportation proceedings before the agency or on judicial review if the underlying action is governed by the procedural requirements of the Immigration and Naturalization Act ("INA"). Accord Ardestani v. United States Dep't of Justice, INS, 904 F.2d 1505, 1509-13 (11th Circ. 1990); Clarke v. INS, 904 F.2d 172, 174-78 (3d Cir.1990).

III.

Full Gospel contends, alternatively, that, even if the government is right about judicial review EAJA, Full Gospel remains eligible for fees for the administrative proceedings under civil action EAJA which contains no "adversary adjudication" limitation. Except as otherwise specifically provided by statue, this provision authorizes a fee award to a party prevailing against the United States "in any civil action (other than cases

sounding in tort), ...in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or tat special circumstances make an award unjust." 28 U.S.C. Sec 2412(d)(1)(A).

It seems rather obvious that Full Gospel's claim, if accepted, would nullify the limitations congress placed on fee awards for administrative proceedings. These proceedings were "part of" the subsequent civil action only in thee sense that they were reviewed by the district court at one point-but just as much (or as little) could be said of any judicially-reviewed agency action. On Full Gospel's theory, prevailing parties in any civil action reviewing an administrative matter in which the government's position was not substantially justified would be entitled to fees for the qualified as an :adversary

adjudication." This interpretation of civil action EAJA would thus override 28 U.S.C. Sec 2412(d)(3), the judicial review EAJA provision allowing fees only for adversary agency adjudications to parties who eventually prevail in court. We have no reason to believe that congress intended such a result.

Finally, Full Gospel asserts that even if the pre-litigation fees for administrative proceedings cannot be recovered, the post-litigation expenses fall into a different category and are authorized under Sullivan v. Hudson, 109 S. Ct. 2238 (1989). Post-litigation proceedings, the arguments goes, were necessary to secure the relief sought in the civil action, because the district court could neither declare that Kim was entitled to permanent resident status nor stay the deportation proceedings.

In Hudson, the Supreme Court did construe the civil action EAJA provision to permit a fee award for administrative proceedings carried out on remand after the plaintiff had prevailed in court. The court, however, emphasized the uncommon statutory scheme before it -the judicial review provisions of the Social Security Act ("SSA"), 42 U.S.c. Sec 405(g)-and distinguished that statue from the standard provisions for judicial review of agency action. 109 S.Ct. at 2254. The Court noted that

> [t]he detailed provisions for the transfer of proceedings to the Secretary and for the filing of the Secretary's subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act.

Id, The Court stressed, moreover, that the plaintiff would not have been a "prevailing party" until the proceedings

on remanding the case to the Secretary (and retaining jurisdiction) have constituted a final determination of the civil action. Id. at 2254-55. The administrative proceedings on remand, the Court concluded, were therefore so "intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees" that they "should be considered part and parcel of the action for which fees may be awarded." Id. at 2255. Proceedings under the INA lack the specific features of the SSA proceedings that, in Hudson, demonstrated the "intimate tie" between administrative and judicial proceedings - the visa revocation and deportation proceedings sparked the civil action but they were not in any generally accepted sense part of the case filed in court.

The government contends Hudson is limited by its own terms to statutes regulating in great detail the interaction between the court and the agency, specifically those statutes which provide for continuing court jurisdiction over post-remand agency proceedings. It argues that we should not follow the recent decision by the Eleventh Circuit which read Hudson far more expansively, see Pollgreen v. Morris, 911 F.2d 527 (11th Circ. 1990). We agree.[3]

The district court in the instant case did not retain continuing jurisdiction and never remanded the case to INS although the agency implemented the court's legal conclusions concerning Kim's eligibility to remain in the United States. The court

[3] In any case, Pollgreen concerned the agency action on remand from a district court-thus satisfying one of Hudson's requirements. There is no remand in this case.

had merely ruled on Kim's qualification for third and sixth preference visas, and had ordered INS to abide by the court's determinations "in any matter relating to the adjustment of Ms. Kim's status," Merits Op., J.A. at 246-47. A great many appeals from administrative actions end with a fairly clear judicial resolution of the parties' respective rights. Standing alone, this characteristic does not suffice to meet Hudson's (or even pollgreen's) tests. Numerous kinds of administrative proceedings are "necessary to the completion of a civil action," Diss. Op. at 3 (quoting Hudson, 109 S. Ct. at 2258), but the Supreme court did not indicate that all other requirements fall by the wayside once this notion of "necessity" is established. Such a reading would contradict rejection of fees for administrative proceedings preceding

the judicial ones - a rejection with which our dissenting colleague agrees. We believe that Hudson sets out specific and well-defined prerequisites for a civil action: there must be a remand by the reviewing court and "detailed provision for the transfer of proceedings from the courts to the [agency]," which would implicate "a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the [APA]," 109 S. Ct. at 2254, before the award of fees can be even considered.

The dissent's claim that Pennsylvania v. Delaware Valley Citizen's Council, 478 U.S. 546 91986), and new York Gas Light Club, Inc. v. Carey, 447 U.S. 54 (1980) allow fees even without remand and retention of jurisdiction by the district court is, in our view, misplaced, Diss.

Op. at 2. Delaware Valley involved interpretation of the phrase "any final order in any action brought pursuant to" certain provisions of the Clean Air Act, see 42 U.S.C. Sec 7604(d) (emphasis added). And New York Gas Light applied the fee-shifting provisions of Title VII, 42 U.S.C. Sec 2000 e-5(k), which provided for attorney's fees "[i]n any action or proceeding under this title" (emphasis added). EAJA, on the other hand, provides fees for a "civil action," a more limited term. Both statues, then, authorized attorney's fees when coordinated administrative/civil schemes, without parallel in the present case, are invoked. As the Hudson Court noted, the dispositions in both those cases hinged on the specific wording and structure of the statutes construed, see 109 S.Ct. at 2256 ("[New York Gas Light Court was] looking

to the entire structure of Title VII").

The theory that fees are available of th district court retains "a functiona equivalent" of continuing jurisdiction b abandoning the explicit requirements o Hudson, would permit an erosion of th statutory limits with no discernibl boundary in sight.[4] This potentiall enormous expansion of the government's fe liability is inconsistent with the Supre Court description of the circumstances i which fees would be available a "unusual." Hudson, 109 S. Ct. at 2254, an with its statement that fees may b awarded only where the post-reman proceedings are "so intimately tied wit judicial proceedings as to be considered

[4] The dissent's reliance on the importanc of the administrative proceeding to th success of the claim sweeps away thi boundary completely, leaving us wit unguided discretion. This is hardl Hudson's teaching.

part of the 'civil action,'" 109 S.Ct. at 2257. None of the standards set out in Hudson is met here and we decline to stretch the Supreme Court's opinion and read the statutory language expansively merely on the basis of the assorted policy considerations urged by Full Gospel. See Diss. op. at 4-5.

Ginsburg, Ruth B., Circuit Judge, concurring in principal part, but dissenting as to fees for INS processing following the district court's decision.

I agree with my colleagues that judicial review EAJA, 28 U.S.C. Sec 2412(d)(3), does not entitle Full Gospel to fees for the pre-litigation visa proceedings or the deportation hearing. See Per Curiam Opinion at 4-5. I agree also that civil action EAJA,28 U.S.C. Sec. 2412(d)(1)(A), does not accommodate a fee award for proceedings at the administrative level prior to the commencement of suit for judicial relief. I dissent, however, from the court's denial of fees for the post-litigation proceedings before INS. Sullivan v. Hudson, 109 S. Ct. 2248 (1989), is the path marking decision. That decision, I conclude, supports a fee award, under civil action EAJA, for the

thirteen hours counsel devoted, after the litigation, to fulfillment of the court's judgment.

In Hudson, the Supreme Court held that civil action EAJA permits a federal court to award a prevailing Social Security Act claimant fees, not only for representation in court, but also for representation at the administrative level following a court-ordered remand. It is true, as my colleagues point out, that in Hudson, the Court emphasized the "uncommon: scheme of the Social Security Act. It is also true that here, unlike Hudson, the district court did not formally remand the case or retain jurisdiction while INS implemented the court's declaration concerning Kim's visa status.

Hudson, however, invoked a more general principle; the Court's decision, which linked the pot-remand administrative

proceedings to the "civil action," did not simply detail and rely on the "somewhat unusual" judicial review prescriptions of the Social Security Act. See Hudson, 109 S. Ct. at 2254. Rather, the Court wrote:

> Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees are sought.

Hudson, 109 S. Ct. at 2255 (emphasis added).

My colleagues, nonetheless, regard as controlling, i.e., essential to Hudson's holding, the remand-retention of jurisdiction pattern present in Hudson. See Per Curiam Opinion at 7-8. The "past decisions" featured by the Hudson Court, however, most prominently Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 54 (1980), did not

involve an administrative proceeding on remand ina case over which the district court retained jurisdiction. Yet the Supreme Court described the principles advanced in those decisions as "controlling." See Hudson, 109 S. Ct. at 2256 ("[T]he principles we found persuasive in Delaware Valley and Carey are controlling here."). I therefore read Hudson as applying a general principle in a particular instance; in the Court's words, civil action EAJA encompasses administrative proceedings that are "intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees." Accord Pollgreen v. Morris, 911 F.2d 527, 536 n.10 (11th Cir. 1990) ("The test espoused by the Supreme Court is not how similar the statue governing a particular

administrative proceedings is to the Social Security Act, but rather, whether the administrative proceedings are intimately tied to the resolution of the judicial action.'").

In determining whether a given administrative proceeding should count as part of the "civil action" for fees purposes, the Hudson Court indicated, the pivotal question is whether "the administrative proceedings on remand...were 'crucial to the vindication of [the private party's] rights.'" Hudson, 109 S. Ct. at 2256 (quoting Delaware Valley Citizens' Council, 478 U.S. at 561). The Court further observed:

> Where a court finds that the [agency's] position on judicial review was not substantially justified within the meaning of the EAJA, ...it is within the court's discretion to conclude that representation on remand was necessary to the effectuation of its mandate and to the ultimate vindication of the [complainant's] rights....

Hudson, 109 S.Ct. at 2257. In addition, the Court commented:

> That Congress carved the world of EAJA proceedings into "adversary [administrative] adjudications" and "civil actions" does not necessarily speak to, let alone preclude, a reading of the term "civil action" which includes administrative proceedings necessary to the completion of a civil action.

Id. at 2258.

In the present case, while the district court did not formally remand or retain jurisdiction, that court did rule definitively on Kim's qualification for third and sixth preference visas, and it ordered INS to abide by the court's determinations "in any matter relating to the adjustment of Ms. Kim's status." Merits Op. (Order), J.A. at 246-47. The follow up processing at INS thus complemented the district court's judgment, served to effectuate the court's mandate, and ultimately vindicated the rights of the party who prevailed in

court. See Hudson, 109 S Ct. at 2257. The thirteen hours in question involved constant calls, correspondence, and office visits by Full Gospel's attorney; as the district court indicated, those hours were diligently and reasonably spent in view of INS's persistence in what the district court called "inexcusable bureaucratic inattention" and disregard of plain facts." See Fees Op. at 2, J.A. at 273. Counsel's post-litigation efforts to propel final action by INS, it seems to me, were thus "intimately tied to the resolution of the Judicial action" within the tenor of the Supreme Court's decision in Hudson.

My colleagues suggest that post-litigation fee liability, like fee liability to pre-litigation administrative proceedings, would be irreconcilable with EAJA's scheme. See Per Curiam Opinion at

8. I agree that if administrative proceedings were considered part of a "civil action" simply because judicial review occurred at one point, then civil action EAJA would totally displace judicial review EAJA: on no occasion would an EAJA claimant who prevailed on judicial review need to invoke judicial review EAJA, with its "adversary adjudication" limitation. If civil action EAJA thus blanketed the territory, Congress' provision for judicial review EAJA would be rendered superfluous. But court-awarded fees for post-litigation proceedings, because of their confined scope and linkage to the court's judgment, do not similarly undermine EAJA';s structure Far from encompassing all administrative proceedings judicially reviewed, court award would cover precisely and only time reasonably spent

by an attorney to prevail in court and, thereafter, to achieve agency actio consistent with the court's decre Judicial review EAJA,as this cas illustrates, would remain vital: the pane is unanimous in holding that th "adversary adjudication" limitatio attending judicial review EAJA rules ou fees for the pre-litigation vis proceedings (93 hours) and the deportatio hearing (13 hours).

Finally, I cannot agree with m colleagues that the availability of fee for administrative proceedings in the wag of a court's judgment would occasio "enormous expansion of the government' fee liability." See Per Curiam Opinion a 8. As Full Gospel maintained in the

supplemental briefing we requested.* it a

agency's subordinate officers are instructed to carry out a court's order promptly, the EAJA claimant's attorney will need to spend little time on post decision proceedings and should not accrue substantial fees. See Appellees' Supplemental Memorandum at 6. If, however, an agency faces no fee liability, then the impetus on the agency's side to proceed expeditiously will be diminished, and the incentive for the claimant's counsel to devote time to the matter may

---

* By order filed December 5, 1990,we directed the parties to brief, discretely, this question:

> Does 28 U.S.C. Sec 2412(d)(1)(A) provide for an award of fees for time spent on administrative proceedings subsequent to the district court's decision on the merits?

We further stated that the briefs should take account, particularly, of Sullivan v. Hudson, 109 S. Ct. 2248 (1989, and Pollgreen v. Morris, 911 F.2d 527 (11th Cir. 1990).

be reduced. See id. at 7; cf. Hudson, 109

S. Ct. at 2256 (absent fees for follow-up administrative proceedings, there would be an "incentive...for attorneys to abandon claimants after judicial remand"). Post-litigation fee liability, as the Supreme Court stated in Hudson, would thus be "ancillary" to the civil. action for judicial review, id. at 2258, and would further the statutory purpose 'to diminish the deterrent effect of seeking review of or defending against, government action.' Id. at 2257 (quoting 94 Stat. 2325).

In sum, guided by Hudson, I would read the term "civil action" in 28 U.S.C. Sec. 2412(d)(1)(A) to include administrative proceedings prompted by, and in aid of expeditious agency recognition and enforcement of a court's judgment. On that ground, I would affirm the district court's award of $1263.60 for "after-litigation" administrative proceedings.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5061 September Term, 1990
CA 88-00521

Full Gospel Portland Church, et al.

v.

Richard Thornburgh, et al.,

Appellants

BEFORE: Mikva, Chief Judge: Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

Appellees' Suggestion for Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT

CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5061 September Term, 1990
CA 88-00521

Full Gospel Portland Church, et al.

v.

Richard Thornburgh, et al.,

Appellants

BEFORE: Ruth B. Ginsburg, Silberman and Sentelle, Circuit Judges

O R D E R

Upon consideration of appellees' petition for rehearing, filed April 26, 1991, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner

Deputy Clerk

Circuit Judge Ruth B. Ginsburg would grant

the petition for rehearing

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FULL GOSPEL PORTLAND CHURCH and HAE SOOK KIM Plaintiffs v. RICHARD THORNBURGH, ET AL., Defendants.	C.A. #88-0521

ORDER

The Court having received plaintiffs' Motion for Supplemental Award of Attorneys' Fees, and the defendants having noticed an appeal on February 20, 1990, from prior rulings of the Court on attorney fees; it is hereby

ORDERED that the plaintiffs' Motion for Supplemental Award of Attorney Fees is stayed pending appeal and that no further attorney fee requests shall be filed with this Court until the Court of Appeals' mandate is received.

United States District Judge

March 19, 1990.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FULL GOSPEL PORTLAND CHURCH and HAE SOOK KIM Plaintiffs	)	
v.	)	C.A. #88-0521
RICHARD THORNBURGH, ET AL., Defendants.	)	

ORDER

Upon consideration of defendants' motion for reconsideration of the Court's Order of October 4, 1989, the responses thereto and the record herein, it is hereby

ORDERED that defendants' motion for reconsideration is denied.

_____

United States District Judge

December 19, 1989.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FULL GOSPEL PORTLAND CHURCH and HAE SOOK KIM Plaintiffs v. RICHARD THORNBURGH, ET AL., Defendants.	C.A. #88-052

MEMORANDUM

This is an application for attorne fees, expenses and costs under the Equa Access to Justice Act ("EAJA"), 5 U.S.C Sub Sec. 504 and 28 U.S.C. Sub Sec. 241 it involves plaintiffs' successful effor in this Court to overturn a propose deportation of plaintiff Hae Sook Ki following administrative proceedin before the Immigration and Naturalizatio Service of the United States Department o Justice ("INS"). The underlying facts ar

fully set out in the Court's Memorandum and Order of October 17, 1988 and need not be repeated here. The application is opposed. Efforts to resolve the fee dispute pursuant to Rule 215 of the Rules of this Court were unsuccessful.

After considering the pertinent papers, the Court finds and concluded as follows.

(1) Plaintiffs are the prevailing party on all significant issues. No appeal was perfected.

(2) The government's decision to deport, which followed from a series of administrative actions and non-actions, was not within the bounds of reasonableness and not "substantially justified." Battles Farm Co. v. Pierce, 806 F.2d 1098, 1101-2, n. 11 (D.C. Cir. 1986); 28 U.S.C. Sub Sec. 2412 (d)(i)(A) (Supp. III 1985). The record establishes

that the decision to deport was made without consideration of factual information clearly establishing Hae Sook Kim's eligibility to remain in this country and inexcusable bureaucratic inattention. INS pursued its course before the Court, ignoring plain facts in an effort to develop new justifications for its course of action.

The INS Director's denial of the Third Preference visa petition was made without his making an independent evaluation of the facts and this conduct led to a wholly unjustified denial of the Sixth Preference petition. That INS, in addition, lost the Sixth Preference papers and only acted on the very eve of the deportation hearing, simply compounded its clearly unjustifiable conduct.

(3) The defendants contend that no administrative time may be awarded under

EAJA. There can be no question but that proceedings before the INS in this instance were adversary as they involved a plaintiff's right to continue to reside and work in the United States. EAJA contemplates award for all reasonable administrative work of an adversary character after the agency has taken a position that is not "substantially justified" affecting the basic issue at stake. Hudson v. Secretary of Health and Human Services, 839 F.2d 1453, 1459-60 (11th Cir. 1988). All administrative time claimed by Washington counsel falls in this category.

(4) Washington counsel, of course, also claims time logged during this litigation, including the deportation hearings, and subsequent work relating to the government's initial decision to appeal, as well as preparation of the fee

application.

(5) All time is thoroughly documented, was clearly efficiently expended and necessary and thus entitled to consideration. Washington counsel is experienced and competent in this special area of INS expertise. The parties have advised the Court in a report that Washington counsel is entitled to an hourly rate of $97.20. This is wholly consistent with the counsel's training and experience and the level of fee in the community.

The Court awards 258.3 hours at this rate, which includes time spent dealing with the government's initial notice of its decision to appeal. (See Plaintiff's Reply Brief, page 6.)

Litigation:	Hours
(a) Complaint filed with U.S. District Court	44.0
(b) Motion for attorney fees and costs	59.3

(c) Time spent after government appeal	36.0
	139.3

Administrative proceedings:

(a) Before litigation	93.0
(b) After litigation	13.0
(c) Deportation defense	13.0
	119.0
Total:	258.3

(6) No fee can be awarded Oregon counsel, whose role in the case is not clearly defined and whose time records cannot be interpreted to clarify the nature of the legal work performed or the amount of time reasonably required.

(7) The following costs and expenses are allowed for Washington counsel:

(a) Filing Fees:	
U.S. District Court	$120.00
INS	210.00
(Motion to reopen-$50.00; Appeal Sixth Preference Visa Petition-$50,00; Appeal deportation order-$110.00)	

(b) Airline fare to attend deportation hearing	437.99
Total costs and expenses allowed:	$767.99

An appropriate Order is filed herewith.

United States District Judge

October 4, 1989.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FULL GOSPEL PORTLAND CHURCH) and HAE SOOK KIM) Plaintiffs)	
v.	) C.A. #88-0521
RICHARD THORNBURGH, ET AL.,) Defendants.)	

ORDER

Upon consideration of plaintiff's motion for award of attorney fees and costs, the opposition and reply thereto and the entire record herein, and for the reasons stated in the attached Memorandum, it is hereby

ORDERED that plaintiff's motion is granted and defendants shall pay to plaintiffs the following:

Attorney fees in the amount of $25,106.76, representing 258.3 hours at

an hourly rate of $97.20; plus costs a
expenses of $767.99.

United States District Jud

October 4, 1989.

I.N.S. Portland, Oregon

PHOTO

PROCESSED FOR I-551

TEMPORARY EVIDENCE OF

LAWFUL ADMISSION FOR

PERMANENT RESIDENCE VALID

UNTIL 11-07-89 EMPLOYMENT

AUTHORIZED

INT. DATE 05-08-89

COA: P37

DOE: 04-28-89

POE: POO

1. Family Name

KIM

2. First (Given Name)

HAE SOOK

18/12/53

3. Birth Date (Day/Mo/Yr)

KOREA

4. Country of Citizenship

FEMALE

5. Sex (Male or Female)

6. Passport Number

7. Airline and Flight Number

8. Country Where You Live

9. City Where You Boarded

USA

10. City Where Visa Issued

11. Date Issue

12410 N.W. Barnes Rd., #363

Portland, Oregon 97229

12. Address While in the United States

(A-27 100 882)

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

U.S. Department of Justice

Immigration & Naturalization Service

511 N.W. Broadway

Portland, Oregon 97209

REFER TO THIS FILE NO:

A27 100 882

April 28, 1989

Hae Sook Kim

c/o Susan Au Allen

Attorney at Law

Paul Shearman Allen & Associates

1625 K St. NW Suite 380

Washington D.C. 20006

The processing of the application for adjustment of status to that of permanent resident filed by the above named individual has been completed. A request

has been forwarded for the allocation

a visa number.

Sincerely yours,

District Director

U.S. Department of Justice

Executive Office for Immigration Review

5203 Leesburg Pike, Suite 1609

Falls Church, Virginia 22041

March 17, 1989

Susan Au Allen, Esquire

Paul Shearman Allen & Associates

1625 K Street, N.W. Suite 380

Washington, D.C. 20006

RE: Hae Sook KIM A27 100 882

Hyung Hwan KIM A27 101 695

Dear Ms. Allen:

This is in response to your letter of March 6, 1989, regarding the above reference deportation proceedings.

The Board of Immigration Appeals normally will not act in a case unless it has the record of proceeding before it. The transcript in this case is currently being prepared. Your request to expedite

consideration of the case has been note
and I have been informed that t
transcript should be completed a
returned to the Office of the Immigrati
Judge within 21 days. By copy of th
letter, I am requesting the Office of t
Immigration Judge to serve the transcrip
on the parties and set the normal briefi
schedule, but to forward the record
proceedings directly to the Board a
advise the parties to file their brie
directly with the Board of Immigrati
Appeals. See 8 C.F.R. 3.3 (c).

Your correspondence is hereby returned
you.

Very truly yours,

W. Wayne Stogner

Deputy Chief Attorney Examiner

Enclosure

cc: Office of the Immigration Judge
Seattle, Washington

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Immigration Judge

1000 Second Avenue, Suite 3150

Seattle, Washington 98104

February 28, 1989

Ms. Susan Au Allen

Attorney at Law

1625 K Street, N.W. Suite 380

Washington D.C. 20006

Dear Ms. Allen:

Re: KIM, Hae Sook, A27 100 882, and

KIM, Kyung Hwan, A27 101 695

This is pursuant to your Motion to Remand these two cases to the District Director. Please be advised that, while the appeals are pending, only the Board of Immigration Appeals has jurisdiction to remand.

At such time as the appeals, with transcript, are sent to the Board, your

Motion to Remand will be considered.

Very truly yours,

DANIEL L. KAHN

Immigration Judge

Form I-464 A

(Rev. I-24-80)N

U.S. Department of Justice

Immigration & Naturalization

Service

NOTICE OF THIRD PREFERENCE APPROVED UNDER SECTION 203(a) OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED.

Name of Beneficiary

Hae Sook Kim

File No.

A27 100 882

Date of Notice

1-30-89

Country of Birth

South Korea

Occupation

Piano Teacher

Date Petition Filed

VALIDITY: The approval of a petition fo
third or sixth preference classificatio
is valid for as long as the supportin
labor certification is valid an
unexpired, provided there is no change i
the respective intentions of th
prospective employer and the beneficiar
that the beneficiary will be employed b
the employer in the capacity indicated i
the supporting job offer.

Please be advised that approval of th
petition confers upon the beneficiary a
appropriate classification. The approva
constitutes no assurance that th
beneficiary will be found eligible fo
admission to the United States, adjustmen
to lawful permanent resident status, o
visa issuance. Eligibility for admissio
or adjustment is determined only whe

application therefor is made to an immigration officer, eligibility for visa issuance is determined only when application therefor is made to a consular officer who is under the jurisdiction of the U.S. Department of State. If the beneficiary's approved petition has been forwarded to a United States consulate, all inquiries concerning issuance of a visa for the beneficiary should be addressed to the Consul. In addition, please note the items below which are indicated by "X" marks concerning this petition;

X The petition has been approved. The beneficiary will be informed of the decision made on the pending application to become a lawful permanent resident (Form I-485).

Full Gospel Portland Church

4325 S. W. 107th Avenue

Beaverton, Oregon 97005

Very truly yours,

DISTRICT DIRECTOR

U.S. DEPARTMENT OF JUSTICE

425 I Street

Washington D.C.

CO 1636-C

21 December 1988

Full Gospel Portland Church

2470 SW Roxbury

Portland, Oregon 97225

Dear Sir:

Reference your Petitions to Classify Preference Status of Alien on Basis of Profession or Occupation, which you filed on behalf of Hae Sook Kim.

Pursuant to the decision of the U.S.

District Court for the District of Columbia in Full Gospel Portland Church and Hae Sook Kim v. Richard Thornburgh, ET AL., No. 88-0521 (D.D.C. Oct. 17, 1988), your petitions have been approved and record has been forwarded to the District Director, Portland, Oregon for issuance of the Notices of Preference Petition Approved.

Any further inquiries should be addressed to the Service office located at 511 N.W. Broadway, Portland, Oregon, 97209.

Sincerely,

THOMAS W. SIMMONS

Chief,

Administrative Appeals Unit

CC: Paul S. Allen, Atty.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FULL GOSPEL PORTLAND CHURCH) and HAE SOOK KIM) Plaintiffs) v.) RICHARD THORNBURGH, ET AL.,) Defendants.)	C.A. #88-0521

MEMORANDUM

This immigration case comes before the Court defendant's motion to dismiss (treated as a motion for summary judgment) and plaintiffs' cross-motion for summary judgment.

Until the defendants revoked plaintiff Hae Sook Kim's (Ms. Kim's) visa petition in September, 1986, she was the accompanist, choir director and piano teacher at co-plaintiff Full Gospel Portland Church in Portland, Oregon,

earning $900 per month for a 40-hour or more work week. She had a Third Preference visa under 8 U.S.C. Sub.Sec. 1153(a)(3), which provides that:

> Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a) of this title, to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences or arts are sought by an employer in the United States.

Pub.L. 96-212, Title II, Sub Sec. 203 (c)(3), 94 Stat. 107, 108 (1980).

The Full Gospel Portland Church serves the Korean-American community in the surrounding community. Like many other churches in this country, it provides programs to meet the needs of its members. Since Koreans have a long musical tradition, one of the needs of its members was piano lessons. Due to the revocation,

the church has no piano teacher; Ms. Kim cannot receive any pay for her work as an accompanist, and she is in the danger of being deported.

The dispute before the Court involves the legality of the revocation of the plaintiff's visa petition. The District Director of the Immigration and Naturalization Service (INS) revoked the petition on the ground that Ms. Kim was not a professional within the meaning of 8 U.S.C. Sub Sec. 1101(a)(32), which provides that:

> The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary and secondary schools, colleges, academies, or seminaries.

Plaintiffs contend that the revocation was arbitrary and capricious in the light of numerous affidavits testifying to the cultural contribution Ms.Kim was making to her church and the

Korean-American community in Portland as a professional musician and music teacher.

I. Facts.

These and other relevant material facts are not dispute.

A. Ms. Kim's status before revocation

In 1984, the Church filed an application with the Department of Labor seeking certification that there were no qualified United States workers ready, willing and able to fill the position offered to and subsequently held by Ms. Kim. It was issued a certification in 1985, and shortly thereafter, Full Gospel petitioned Defendants for a Third Preference visa petition. Defendants, through the Northern Regional Service Center, approved the petition in July of 1985. That October, Ms. Kim and her family filed with the

defendants their applications to adjust their status to permanent residents. she was granted permission to work, and in January, 1986, she began employment wit the Church according to the terms of her job offer, $900 per month, and Full Gospel paid her Social Security taxes.

B. The revocation.

In March, 1986, notice was sent to Ms. Kim that the Service intended to revoke her Third Preference visa petition. She responded to that notice, but in September, 1986, defendants revoked her petition, alleging the following:

1. Ms. Kim is not a certified teacher, nor a professional. Her music school (the Church) is unaccredited.

2. Though her labor certification had called for someone who could teach beginning, intermediate and advanced students, Ms. Kim presented no evidence

that she was in fact teaching intermediate or advanced students.

3. The Church's music school did not need a person holding a college degree to teach piano and music.

4. The salary offered to Ms. Kim was not within the general range into which professionals's salaries fall.

5. The Church congregation is too small to have made a bona fide job offer.

6. Students might discontinue their lessons after only a few months, which also indicates that Full Gospel did not make a bona fide job offer.

C. The Appeal

The Church filed an appeal of the revocation with the Administrative Appeals Unit (AAU) in Washington, D.C. The AAU upheld the revocation and dismissed the appeal, although it found that Ms. Kim is a credentialed music graduate; that a

department chairman form the University of Oregon had found that the Church's program would require a degree person if Full Gospel were to offer the program it described in its petition; and that the Church received fees from the music and piano students and paid Ms. Kim's salary.

Nevertheless, the AAU concluded that the Church had failed to demonstrate that Ms. Kim "would be employed in preponderant part in a capacity requiring the skills of a professional as either a musical accompanist or a teacher," and had failed to "establish [the Church] had the ability to pay [Ms. Kim's] salary as of December 1984." It upheld the District Director's determination that the position did not qualify as a profession pursuant to case law. Thereafter, defendants denied Ms. Kim's application for an adjustment of status to become a permanent resident and

revoked permission for her to work.

D. Subsequent Events.

On September 30, 1987, Full Gospel submitted to defendants a Motion to Reopen and Reconsider the Third Preference petition, and a petition for a Sixth Preference Visa, which are granted to skilled workers coming to perform skilled services. The standard for skilled workers under the Sixth Preference is not as strict as that for professional workers under a Third Preference visa:

> Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a) of this title, to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States. (Emphasis added.)

8 U.S.C Sub Sec. 1153(a)(6). Defendants denied the Sixth Preference petition at

Ms. Kim's deportation hearing last February, and plaintiffs appealed. Defendants still have not acted on either the Third Preference Motion to Reopen, filed in September, 1987, or the Sixth Preference appeal.

This Court must first determine whether it has jurisdiction, prior to administrative action on her Motion to Reopen and her Sixth Preference appeal, to consider these issues. If the Court does have jurisdiction, and finds she has exhausted her administrative remedies or otherwise is properly before the Court, the Court must address the second question of whether the District Director and the Administrative Appeals Unit correctly revoked her Third Preference visa and denied her Sixth Preference Visa, or whether the revocation was an abuse of discretion. Finally, plaintiffs ask the

Court to declare Ms. Kim eligible for an adjustment of status.

II. Jurisdiction

Title 8 U.S.C Sub Sec. 1329 and the Administrative Procedure Act, 5 U.S.C Sub Sections 701-706, grant this Court jurisdiction to consider whether or not plaintiff has exhausted her administrative remedies.

III. Exhaustion of Administrative Remedies

The basis of the government's motion to dismiss is that Ms. Kim has not exhausted her administrative remedies and thus, the matter is not ripe.

While the Court recognizes that the INS is overburdened, it has been over a year since the Third Preference motion was filed, and seven months since the Sixth Preference appeal was filed. This delay

justifies the District Court in compelling agency action. Section 706 of the Administrative Procedure Act provides that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall --
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.... (Emphasis added.)

The INS has unreasonably delayed a determination on the reopening. The September 30, 1987 Motion to Reopen the denial of the Third Preference visa and the February 29, 1988 appeal of the Sixth

Preference denial are thus ripe for adjudication.

Under the circumstances of this case, agency delay is equivalent to the denial of relief, thereby justifying judicial review before all administrative avenues are fully exhausted. Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970). The Court is well aware that many petitioners to the INS seek and benefit from delay. However, with the strict prohibitions on Ms. Kim's ability to work, and her apparent compliance, the INS may be essentially starving the petitioner out of the country. More importantly, postponing review that would be favorable to the plaintiff may result in the immediate, direct and significant hardship of deportation. State Farm Mutual Auto Insurance Co. v. Dole, 802 F.2d 474 (D.C.

Cir. 1986), cert. den., New York v. Dole, 107 S. Ct. 1616. Ms. Kim must have her visa status approved before the final resolution of the deportation order, since it will affect her possible deportation.

Moreover, the waiver of exhaustion is justified because Ms. Kim has no realistic chance of prevailing before the agency, regardless of the record she presented. In a letter to Ms. Kim's Oregon counsel dated November 10, 1987, the District Director stated that:

> "[T]here is little likelihood that your clients will derive resident status in the immediate future; there are no visa numbers available to them under the sixth preference category at the present time; there is little likelihood that the Motion to Reopen and Reconsider the revocation of the third preference petition will be granted..."

Waiting for a decision on the motions would thus be futile, according to the statements of the INS itself. The Administrative Appeals Unit appeared not

to make an independent determination of Ms. Kim's professional status on her Third Preference appeal; rather, it rubber-stamped on the District Director's revocation, adding only another, equally-unavailing reason for revocation. The futility of waiting out the administrative process further justifies intervention now. Rafeedie v. INS, 688 F. Supp. 729 (D.D.C. 988); Atlantic Richfield Co. v. Unites States Department of Energy, 769 F.2d 771, 781-782 (D.C. Cir. 1985).

The exhaustion rule serves; (1) to promote administrative efficiency by preventing premature interference with agency processes; (2) to encourage respect for executive autonomy by allowing the agency the opportunity to correct its own errors; (3) to facilitate judicial review by affording courts the benefits of the agency's expertise; (4) to promote

judicial economy by having the agency compile the factual record. Weinberger v. Salfi, 422 U.S. 749, 765 (1975). Due to the delay mentioned above, Ms. Kim's resort to the District Court does not prematurely interrupt any agency proceedings. McKart v. United States, 395 U.S. 185, 193 (1969); Athlone Industries, Inc. v. Consumer Product Safety Commission, 707 F.2d 1485 (D.C. Cir. 1983). The agency has had a chance to rectify error, and has failed to do so. Ms. Kim is at risk of being deported, and if error is present the agency's concern for the proper sequence of determinations in this case must be ignored. The benefits of the INS's expertise in this case have been minimal, and the agency had a sufficient factual record upon which to base its review at the appeal of the revocation and when it denied the Sixth

Preference petition. McKart, 395 US. at 194-195; Athlone, 707 F.2d at 1488. Issues relating to the Third and Sixth Preference Visa petitions are properly before the Court.

IV. Burden of Proof for Revocations and Visa Denials.

The Court will next turn to the substantive reasons for which Ms. Kim's visa petition was revoked. In this inquiry, Ms. Kim ultimately bears the burden of proof as to her eligibility for a visa, 8 U.S.C. Sub Sec. 1361. However, the Attorney General is entitled to revoke a visa petition only if he or she has "good and sufficient cause" to do so. 8 U.S.C. Sub Sec 1155. The INS must sustain a much heavier burden of proof when it seeks to invalidate a visa petition that has already been granted than when it

initially denies a visa, as petitioners have a much more significant interest in continuing in a status according them work privileges than in initially obtaining such a status. The Service retains at least the burden of producing substantial evidence supporting its determination when it seeks to revoke a visa petition. Tongatapu Woodcraft Hawaii, Ltd., v. Feldman, 736 F.2d 1305, 1308-1310 (9th Cir. 1984). Revocations have been sustained when a petitioner's statements were inconsistent and a supporting affidavit was found to be fraudulent. Joseph v. Landon, 679 F.2d 113 (7th Cir. 1982); or when investigation found substantial overestimation in the estimates of employer's gross annual income contained in the labor certification application. Tongatapu, 736 F.2d at 1310. There are no similar

allegations of fraud, misrepresentations or newly discovered facts here.

V. Visa Revocation and Denial

A. Ms. Kim's Professional Status.

The thrust of the District Director's rationale for revoking Ms. Kim's visa petition is that she is not a professional, and that Full Gospel did not need a professional music teacher.

Ms. Kim is a credentialed music composition graduate of a respected Korean institution, Song Sim University (Sacred Heart), and her credential was judged to be the equivalent of a Bachelor of Arts degree in Music, Theory and Composition. While most of her course work was in music itself, rather than education, she did study educational psychology, development of youth, curriculum and method of teaching, guidance, and took courses in

the history and principles of education. She has particular skills obtained through a specialized training program and higher education. She directed the Church's music program. As choir director, she not only accompanied the choir's singing, but she directed it, arranged the pieces, and supervised its three hours of practice each week. She was required to play at services seven days a week, twice a day most days, usually beginning at 6:00 a.m. As Full Gospel's piano teacher, she taught the very subjects she studied in college: music, theory, harmony, score, sight reading, composition and music appreciation, at the beginner, intermediate and advanced stages. Although she did not supervise other employees, she instructed students for 28 hours per week, which, of course, required significant time outside of work to plan. She was

required to fulfill extra duties, such as to play on holidays or for special occasions, and the affidavits make no mention of pay over and above her $900 per month salary. She also needed to devote herself to independent practice. As numerous affidavits attested, she worked in a prestigious and essential position in the Church and in the Korean community in Portland.

The word "professional" has lost much of its meaning and does not admit of precise definition. However, as quoted above, the Act defines teachers as professionals, and does not limit professional teachers to those teaching at accredited schools. Immigration cases define a professional position as

> one which requires a standard and at least baccalaureate level of university education for practice, in which that education is used and applied, and which requires extensive autonomous application of

> individual professional knowledge to particular fact situations. Re Portuguese Do Atlantico Information Bureau, Inc., I & N Interim Dec. No. 2982 (Comnr., 1984).

No section of the Code of Federal Regulations further elucidates what characteristics distinguish professional positions from non-professional ones pursuant to Sub Sec. 203 of the INA, but the Code offers a much more satisfactory framework for evaluating professional status under the Fair Labor Standards Act, 29 U.S.C. Sub Sec. 213, which exempts professionals from minimum wage and maximum hour laws. 29 C.F.R. Sec. 541 (1987). Ms. Kim's job seems to be an amalgam of the three types of professional work specified therein: those jobs requiring knowledge acquired by specialized study; work that is original and creative in character; and teaching, and she clearly fits within both the

artistic and the teaching exemptions. Section 541.3 of 29 C.F.R. (1987) defines "Professional" as follows:

> The term "employee employed in a bona fide... professional capacity" ... shall mean any employee:
>
> (a) Whose primary duty consist of the performance of:
>
> (1) Work requiring knowledge of an advance (sic) type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or
>
> (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or
>
> (3) Teaching, tutoring, instructing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed.

Under the accompanying explanations, the

learned degree category is usually typified by "the appropriate academic degree," Sub Sec. 541.302(e)(1), in Ms. Kim's case, a B.A. in Music. As a pianist and choir conductor, Ms. Kim is a professional artist. "Musicians, composers, conductors, [and] soloists, are all engaged in original and creative work within the sense of [Sub Sec. 541.3(a)(2)]." Sec 541.303(c)(1). With regard to the requirement of the artistic exemption that the result must depend primarily upon the invention, imagination or talent of the employee, the regulations off-handedly state that: "This requirement is easily met by a person employed as an actor, or a singer, or a violinist, or a short-story writer." Sec. 541.303(d). If a violinist is a professional artist, a pianist qualifies.

Teaching also explicitly includes

"vocal or instrumental music instructors," Sec. 541.302(g)(2), and a certificate is only required if the teacher is teaching in a public school or in a private school requiring certification, or like situations. Sub Sec. 541.302.(g)(3).

The other requirements of professional status under the labor statutes are also met by Ms. Kim's job. Her teaching and choir directing "require[s] the consistent exercise of discretion and judgment in its performance" in conformance with Sub Sec. 541.3(b). Her work is also "predominantly intellectual and varied in character "as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the result accomplished cannot be standardized in relation to a given period of time," as Sub Sec. 541.3(c) requires. That is, for

example, her students may progress at a rate that cannot be standardized, and one cannot conduct a choir practice in any routine fashion. The regulations recognize in Sec. 541.3(d) that not every moment of a professional's time is devoted to activities that fit the requirements of professionalism, as described above. So even if up to twenty percent of Ms. Kim's time is devoted to more routine, non-creative work, she may still maintain her professional status.

The final requirement of professionalism concerns salary. To be a professional, one must be compensated at a rate of not less than $170 per week. Sub Sec. 541.3(e). Although the District Director stated that her salary was not in the range considered professional, her salary is within this legal benchmark. Ms. Kim will make $10,800 per year; the

minimum professional salary is $8,804. Her salary may be below that of many other professionals for reasons unrelated to her professional status. Churches are likely to have less ability to pay high salaries than for-profit enterprises, though affidavits from ministers of other churches attest to the crucial need to have a professional music director, especially in evangelical churches. The arts generally pay smaller salaries than technical fields, and, as has been much noted, women working in jobs not dominated by men generally seem to be at the short end of a pay-gap.

The Court finds that Ms. Kim's responsibilities were professional. She is involved in Korean music. It is highly unlikely that similar programs could be run by an American without baccalaureate and professional qualifications. The Court

is convinced that a baccalaureate program would ordinarily be required.

Full Gospel presented affidavits testifying to the central role music plays in Korean culture generally and to Korean Christian churches in particular. These affidavits are in accord with Korean texts not prepared with an eye towards litigation. In his authoritative history of Korea, A New History of Korea, Professor Lee Ki-Baik weaves the theme of the importance of music to Korean culture in general and Korean religion in particular. In every major period and movement in Korea's long history, music and religion have inspired and sustained each other. Music was central to shamanistic worship, ancestor worship and heaven worship from the neolithic age to shamanism's present vestiges; it has been integral to the religious harvest

festivals since the Confederated Kingdoms period from about the beginning of the First Century A.D. Music has been linked with Buddhism since its arrival in Korea in 372. The intellectual, religious and philosophical life of the Korean aristocrat has been marked by poetry and music since the Three Kingdoms period and particularly after the introduction of Confucianism, which was the philosophy of the aristocratic classes from about 700. Even the soul should of modern nationalist political movements in the nineteenth and twentieth centuries have been expressed musically. So it is no surprise that Christianity in Korea, since its introduction in 1653, and especially after the arrival of missionaries in the 1880's, has propagated its message through music. Given these historical links of music and religion, with the emphasis Koreans and

Korean-American culture place on education, it is entirely understandable that a college degree is necessary to teach in a church whose music program caters to Korean-Americans, when such a degree might be unnecessary in another setting.

The INS' objections to Ms. Kim's professional status are not supported by substantial evidence. If Ms. Kim had been teaching at an unaccredited match-book correspondence school, the objection to Full Gospel's unaccredited status might have more merit. However, this objection holds little weight regarding a church music program. Such programs typically hire music professionals, even though they do not ordinarily acquire any sort of accreditation.

Second, even if, as the District Director contends, the program did not

have many advanced students soon after its inception, it is understandable that the Church would want someone of Ms. Kim's training. so as to be able to teach those children who progressed to the intermediate and advanced stages, and to teach more advanced students when they signed up for classes. Moreover, the fact that she studied music itself, rather than focusing primarily on education does not impair her professional status as a musician or music teacher.

Finally, in upholding the revocation of her visa, the AAU commented critically that Ms. Kim's career was interrupted, and that this was further evidence that she is not a professional. However, the church submitted over twenty affidavits attesting to her experience as a music teacher over twenty-one month period from May, 1975 to March, 1977 in Korea. At no little

inconvenience, these affidavits were gathered from her students who continue to live in Korea. The INS's objection to any interruptions in a career is inappropriate, as professional careers are often interrupted by childbirth or childrearing, moves (or emigration), family illnesses, travel or other circumstances. To link an uninterrupted career with professionalism might well have a disparate impact on the professional status of women, though many men, of course, also interrupt their careers for one reason or another. A professional music teacher should not be stripped of her status by virtue of an interruption in her career as she struggles to enter American society.

The Court accordingly finds the revocation of Ms. Kim's Third Preference visa petition to be clearly erroneous.

In addition, the decision of February 25, 1988 denying her Sixth Preference (skilled worker) visa petition was unjustified and an abuse of discretion. In order to obtain a Sixth Preference visa when numbers are available, the petitioner need only show that it has a job for the petitioner, the ability to pay her, and that the beneficiary meets the qualifications required by the job offer. Full Gospel petitioned defendants for a Sixth Preference visa on September 30, 1987. Sixth Preference visa numbers were not available then, but numbers became available on February 1, 1988. However, defendants lost her original application: when plaintiff's counsel called on February 18, 1988 to inquire about the status of the petition, she was told there was no such petition in the file. Plaintiff's counsel immediately recopied

all the information and sent it to defendants. Ms. Kim was denied the visa at her deportation hearing February 29, 1988 by a written decision dated February 25. The immigration judge found her deportable, there being no approved visa petition.

Surely, even if the INS might have doubted her professional status, it was clearly unreasonable and an abuse of discretion to deny her a skilled preference visa when numbers were available. In addition to her musical and pedagogical skills, the INS apparently did not consider her facility in Korean language, an essential prerequisite for her job at Full Gospel. As will be discussed below, denial on the basis of Full Gospel's alleged inability to pay would also have been an abuse of discretion. Because visa numbers were

available during the pendency of he application, and because denial seems t have been based on the same consideration that led to denial of her Sixth Preferenc visa, denial was an abuse of discretion.

B. The Church's Ability to Pay fo Ms. Kim's Position.

The District Director contended that Ful Gospel's job offer was not bona fide, an the AUU stated further that there was "n evidence... that the petitioner wa immediately able to pay the beneficiary' proffered salary when it filed it application for alien labo certification." Yet there is ampl evidence that Full Gospel could pay, and continued denial of her visa is thus clea error. The Church submitted its 1984, 198 and 1986 financial statements, whic showed that it had revenue and workin capital in the years 1984, 1985 and 19

sufficient to support her $900 per month salary. In addition, it had received pledges totalling $41,600 to be paid over a four-year period by its own parishioners solely for use by the music school. Full Gospel has also submitted 33 affidavits by residents in the Portland metropolitan area who attested to the need for a music program at Full Gospel. Even if some of the students quit their music lessons, as the District Director surmised, Full Gospel will likely be able to support Ms. Kim as new students sign up. The fact of turnover is not prohibitive. Overall, the trend is likely to be in the other direction, as the Full Gospel Church and the Korean community in Portland are growing. Because the petitioner has shown a reasonable expectation of increased business, the visa should be approved. Matter of Sonegawa, 12 I & N 612 (Regional

Comnr. 1967).

Moreover, the Church need not b
fully self-reliant. It has submitte
statements of its national organization
Assemblies of God Korean District Counci
of the United States, which provide
educational, missionary, financial an
counseling support to the Full Gospe
Church. The affidavit of Rev. Richar
Chung, Secretary-Treasurer of the Counci
of the Uni ed States, promises that if th
need arose for financial support for Ful
Gospel's music program, the Council woul
provide such support. These promise
further support the plaintiffs' contentio
that the Church could pay her salary, an
assure the Court that the decision at th
Administrative Appeals Unit was in cle
error. Both the Director and the AA
contend, without support, that the Ful
Gospel Portland Church is the sol

relevant financial supporter for the purpose of determining the employer's ability to pay Ms. Kim. Clearly, if Full Gospel is financially linked to the larger church in the United States, and it has obtained pledges of support for the music program from the nationwide church, the INS must consider these resources. New divisions in businesses or new parishes of larger churches may not themselves be financially profitable, but if documents show that they may rely on the larger body for support, it is arbitrary and capricious for the INS not to consider the resources of the larger organization in making its evaluation of ability to pay.

VI. Requests for Adjustment of Status and to Stay Deportation Proceedings.

Plaintiff also requests that this Court declare her eligible for an adjustment of

status to become a permanent resident and enjoin the Immigration & Naturalization Service from continuing in the deportation proceedings. The Court cannot simply declare Ms. Kim eligible to become a permanent resident, because more is involved than simply having a valid visa petition. Title 8 U.S.C. Sec. 1255, Sub Sec 1255a and Sub Sec 1255b (1986) enumerate the various elements involved in adjusting one's status to that of a permanent resident. The Court does not have before it any evidence regarding factors other than her visa petition, so it is unable to make a determination on adjustment of status based on the papers before it.

Ms. Kim's complaint requested that the Court stay deportation proceedings, which it cannot do, either. Plaintiff has failed to exhaust her administrative

remedies and the Court lacks jurisdiction. Plaintiff currently has an appeal from the order of deportation pending, and Section 106 of the Immigration and Naturalization Act, 8 U.S.C. Sec 1105a, gives exclusive review of final deportation orders to the Circuit Courts. However, any deportation proceeding or appeal from the denial of Ms. Kim's petition to adjust her status must take into account the conclusions of this Memorandum opinion.

A separate Order in accord with this Memorandum is attached.

_____

United States District Judge

October 17, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FULL GOSPEL PORTLAND CHURCH and HAE SOOK KIM Plaintiffs v. RICHARD THORNBURGH, ET AL., Defendants.	C.A. #88-052

ORDER

This matter is before the Court o defendants' motion to dismiss (treated a a motion for summary judgment) an plaintiffs' cross-motion for summar judgment. For the reasons stated in th accompanying Memorandum, it is hereby

ORDERED that the defendants' motio is denied; and it is further

ORDERED that plaintiffs' motion fo summary judgment is granted with referenc to petitioner's Third and Sixth preferen

visa petitions, as of the dates she first applied for them; and it is further

ORDERED that plaintiffs' motion for summary judgment on adjustment of Ms.Kim's status is denied, without prejudice, except that the Immigration and Naturalization Service is directed to consider and to abide by the determinations in this Order as to Ms. Kim's visa petitions in any matter relating to adjustment of Ms. Kim's status.

United States District Judge

October 17, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FULL GOSPEL PORTLAND CHURCH and HAE SOOK KIM Plaintiffs	)	
v.	)	C.A. #88-0521
RICHARD THORNBURGH, ET AL., Defendants.	)	

ORDER

Reference is made to the first and second defenses in the Answer filed April 26, 1988, addressed to the Court's lack of jurisdiction, and it is accordingly

ORDERED that defendants shall file and serve a motion to dismiss in support of each of these defenses on or before May 23, 1988.

_____

United States District Judge

May 3, 1988.

IN THE MATTER OF KIM, HAE SOOK

FILE A27 100 882

IN DEPORTATION PROCEEDINGS

Respondent

Order of the

Immigration Judge

Upon the basis of respondent's admissions, I have determined that he is deportable on the charge(s) stated in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation respondent granted voluntary departure without expense to the Government on or before April 1, 1988 or

any extension beyond such as may be granted by the district director for the Immigration & Naturalization Service, under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, privilege of voluntary departure shall be withdrawn without further notice proceedings and the following order shall thereupon become immediately active; respondent shall be deported from the United States to KOREA on the charge(s) contained in Order to Show Cause.

Copy of the decision has been served on respondent and the Immigration and Naturalization Service

Appeal. Reserved

2/29/88

PORTLAND, OREGON

_____

Daniel L. Khan

(Immigration Judge)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
511 N.W. Broadway;
Portland, Oregon 97209

A27 100 882

Date: 2-25-88

Full Gospel Portland Church
1315 S.E. 20th Street
Portland, OR 97214

DECISION

Upon consideration, it is ordered that your I-140 visa petition for Hae Sook Jung KIM be denied for the following reasons:

SEE ATTACHED

If you desire to appeal this decision, you may do so. Your notice of appeal must be field within 15 days from the date of this notice, (18 days if this notice was received by mail). If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

Regional Commissioner on the enclosed Form I-290B (A fee of $50.00 is required)

If an appeal is desired, the Notice of appeal shall be executed and filed with this office, together with the required fee. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

cc.: Paul Shearman Allen & Assoc.
ATTN: Susan Au Allen
1625 K Street, N.W.
Washington, D.C. 20006

Sincerely,

District Director

Section 203(a) of the Immigration and Nationality Act, as amended, provides in pertinent part:

> (6) Visas shall next be made available to qualified immigrants who are capable of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

The petitioner in this case filed an earlier visa petition for the beneficiary under Section 203(a)3 of the Act. That petition was revoked on September 3, 1986. That revocation was upheld on March 30, 1987. In addition, to the grounds finding the beneficiary was not a professional. The Administrative Appeals Unit also found that the petitioner had failed to establish that if it was immediately able to pay the beneficiary's proffered salary as of December, 1984, when the labor certification was filed. (See Matter of Great Wall, 16 I&N Dec. 142 (Act. R.C.

1977) and 8CFR 204.1(d)(2). The additional information submitted by the petitioner in this petition failed to establish that the petitioner was immediately able to pay the beneficiary in December of 1984.

In addition, the AAU found that it cannot be favorably determined that the petitioner is factually the true employer of the beneficiary. It is for this reason that the AAU chose to deny the petitioner's earlier appeal rather that the small size of the petitioner's organization per se. The above named grounds apply to petitions filed under section 203(a)(6) of the Act as well as to petitions filed under section 203(a)(3) of the Act. Accordingly, it is determined that the petitioner has failed to establish that it had the ability to pay the beneficiary's salary as of December,

1984, in accordance with Matter of Great Wall, supra. It is also concluded that the petitioner has failed to establish that the beneficiary's proposed employment is a bonafide job offer rather than an accommodation to the beneficiary. In view of the above, this petition will be denied.

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION & NATURALIZATION SERVICE

511 N.W. BROADWAY

PORTLAND, OREGON 97209

PLEASE ADDRESS REPLY TO

DD&P OAS

AND REFER TO THIS FILE

NO.

A27 100 882

A27 101 695

November 10, 1987

Churchill, Leonard, Brown & Donaldson

Attorneys at Law

P.O. Box 804

Salem, Oregon 97308-0804

Attention: Mr. Robert W. Donaldson,

Attorney

Dear Sir:

This is in reply to your letter of September 8, 1987, wherein you requested an extension of voluntary departure and employment authorization for Hae Sook KIM and Kyung Huan KIM.

Since receipt of your letter a sixth preference visa petition was filed in behalf of Hae Sook Kim on September 20, 1987. A Motion to Reopen and Reconsider the revocation of the third preference petition was filed on October 22, 1987. However, the above two actions will not alter a decision to deny a further extension of voluntary departure for the following reasons: there is little likelihood that your clients will derive resident status in the immediate future; there are visa numbers available to them

under the sixth preference category at the present time; there is little likelihood that the Motion to Reopen and Reconsider the revocation of the third preference visa petition will be granted and there is no requirement that Hae Sook Kim be present in the United States during the adjudication of either the motion or the sixth preference petition. For the above reasons, a further extension of voluntary departure will not be authorized.

Since your clients failed to depart at the expiration of their last period of voluntary departure on September 7, 1987, Orders to Show Cause why they should not be deported will be issued. You will be furnished a copy of the Order to Show Cause and will be notified of the deportation hearing date.

On issuance of an Order to Show Cause, any grant of employment authorization is automatically terminated. Reapplication for employment authorization may be made under 8 CFR 274.12(c).

Sincerely,

C.R. Houseman
District Director

U.S. Department of Justice

Immigration and Naturalization Service

551 N.W. Broadway, Portland, OR 97209

DECISION ON APPLICATION FOR

STATUS AS PERMANENT RESIDENT

Refer To This File No:

A27 100 882

A27 101 694

A27 101 695

A27 101 696

Date: May 5, 1987

Hae Sook Kim & Family

12410 N.W. Barnes Road, #363

Portland, OR 97229

Upon consideration, it is ordered that your application for status as a permanent

resident be denied for the following reason:

SEE ATTACHED

You are granted to Jun 8, 1987 to effect your departure from the United States voluntarily, without the institution of proceedings to enforce your departure. You must notify this office before that date on the enclosed card (Form I-438) of the arrangements you have made to depart from the United States. At the time of your departure from the United States, do not fail to surrender Form I-94, Arrival-Departure Record, in accordance with the instructions on that form.

If you fail to depart from the United States by the date specified, proceedings will be instituted to enforce your

departure. You may renew your application for status as a permanent resident during such proceedings.

Sincerely yours,

Carl R. Houseman

District Director

Enclosures: I-438

I-94

I-210

cc: Richard L. Hendrie,Jr.

Attorney at Law

The applicant has applied for the benefits of section 245 of the Immigration and Nationality Act, as amended.

Section 245 of the Act provides in pertinent part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if ... (2) the alien is eligible to receive a visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is

filed.

The visa petition supporting the application has been revoked. In the absence of any indication that the applicant is entitled to any other status of the applicant is entitled to any other status the applicant must be presumed to be classifiable a nonpreference immigrant. (Section 203(d) of the Act).

Non-preference quota numbers are currently unavailable and were unavailable at the time the applicant applied for adjustment of status. Accordingly, the applicant has not established that an immigrant visa is immediately available as required by section 245(a)93) of the Immigration and Nationality Act, as amended, and this application is therefore denied.

In addition, he applicant's employment authorization is hereby revoked.

ATTACHMENT TO FORM I-291; A27 100 882;

DATE MAILED MAY 5, 1987

U.S. Department of Justice

Immigration & Naturalization Service

---

425 Eye Street, N.W.

Washington, D.C. 20536

FILE: A27 100 882 Portland

IN RE: Petitioner: Full Gospel Portland Church

PETITION: Petition to Classify Preference Status of Alien on Basis of Profession Pursuant to Section 203(a)(3) of the Immigration and Nationality Act, 8 U.S.C 1153(a)(3)

IN BEHALF OF PETITIONER:

Richard L. Hendrie, Jr., Esquire

235 Union Street, N.E.

P.O. Box 804

Salem, Oregon 97308

DISCUSSION: The preference immigrant visa petition was initially approved by the director, Northern Regional Service Center. The district director, Portland Oregon, subsequently reviewed the matter and concluded the visa petition should not have been approved. Consequently, he served the petitioner with notice of his intent to revoke the visa petition and his reasons therefore, subsequently, formally revoked the visa petition. The matter now lies before the Commissioner on appeal. The appeal will be dismissed.

The petitioner is a Christian church serving a Korean congregation of fewer than 100 persons (including children). It does not have its own facilities but leases space in an established church of separate denomination. It seeks to employ

the beneficiary permanently as a piano teacher and accompanist. The district director concluded the petitioner had failed to establish the proposed employment of the beneficiary would be in a professional capacity or that her proposed employment constitutes a "bona fide" job offer.

On appeal, counsel for the petitioner argues the contrary propositions, asserting the church has established a Music School to provide music and piano instruction to members of its congregation and the public. Counsel argues in particular:

> ...The fact that many of the beneficiaries [sic] students are beginners does not lessen, but rather heightens the need for a qualified professional teacher to

fill the position.

Counsel argues vigorously the offered teaching position requires a degree person and submits letters from responsible persons offering the opinion that the petitioner's program "as described" would require a person with a baccalaureate degree in music.

Review of this extensive record reflects the district director raised proper and valid objections to approval of this visa petition which have not been sufficiently rebutted on appeal. The beneficiary is a credentialed music graduate, although she has not (with the exception of her present position) been active in either performance or teaching for ten years. Her pedagogical experience consists of less than two years of undocumented self-

employment as a provider of private piano instruction in Korea following her graduation from a womens' college in that country in 1975.

Review of the aforementioned letters submitted on appeal, reveals the following:

> A University of Oregon department chairman states the petitioner's program would require a degreed person based upon its offering a program including: "music theory, harmony, scoring, sight-reading, composition, and individual lessons incorporating technical knowledge, aesthetic appreciation, and appropriate instructional techniques."

A certification officer of the State

> of Oregon Teacher Standards and Practices Commission advises a baccalaureate degree from an approved education institution and completion of a teacher education program in an approved education institution are required for certification to teach in State accredited public schools.
>
> A director of the Association of Christian Schools International states a bachelor's degree is required for any level of ASCI certification in schools seeking accreditation through the association.
>
> [emphasis added]

The beneficiary would not be teaching in a public or other accredited school. She has

to completed an approved educational (teaching) program at an accredited education institution. Review of the petitioner's current list of students does not support a finding that the beneficiary would substantially be offering musical instruction to other than the beneficiary would substantially be offering musical instruction to other than very elementary music students. The beneficiary's collegiate studies were undertaken at a liberal arts womens' college. As remarked above, the record is silent with respect to the reputation and depth the college's music faculty or their respective credentials. However, there is no evidence in the record supporting a conclusion the beneficiary has completed more than a single general music "education" class. There is no evidence she has completed any courses in teaching woodwinds, percussion,

brass, or stringed instruments, or in vocal techniques. Her college transcript reveals no piano pedagogy courses nor the other usual courses associated with "teacher preparation" for music student. She has completed only limited studies in sight-reading and orchestration, and her keyboard training has not been at an advanced level.

Though unaddressed by the district director, there is no evidence in this record that the petitioner was immediately able to pay the beneficiary's proffered salary as of December 1984 when it filed its application for alien labor certification with the Secretary of Labor. See: Matter of Great Wall, 16 I&N Dec. 142 (Act. R.C. 1977) and 8 CFR 204.1(d)(2). The petitioner has had no salaried employees in 1984 and 1985. Further,

notwithstanding the fact the petitioner has now made arrangements whereby the beneficiary's private music/piano students pay fees to the church's music school, which in turn pays the beneficiary's proffered salary from those fees, it cannot be favorably concluded the petitioner is factually the true employer of the beneficiary or that it can literally guarantee her salary if her students choose to discontinue their private lessons - as the district director noted is often the case with younger students. Though this matter may be distinguished from Matter of Hua Min Lin, 15 I&N Dec. 421 (BIA 1975), the basic objection to approval of either visa petition remains virtually identical. The petitioner's representation with regard to

their respective applications for labor certification did not truly reflect the terms of the beneficiaries's respective employment and manner of compensation.

In final analysis, it is concluded the petitioner has failed to demonstrate the beneficiary would be employed in preponderant part in a capacity requiring the services of a professional as either a musical accompanist or a teacher. See: Matter of Delis, 11 I&N Dec. 860 (R.C. 1966). It is further concluded the petitioner has failed to establish it had the ability to pay the beneficiary's salary as of December 1984 in compliance with Matter of Great Wall, supra. Consequently, it is concluded the district director's determinations that the position being offered does not qualify as a "profession" pursuant to administrative

case law, and that the beneficiary's proposed employment would be more an accommodation to the alien beneficiary rather than bona fide job offer, are essentially correct. Accordingly, his decision will not be disturbed.

ORDER: The appeal is dismissed.

DATED: 30 MAR 1987

FOR THE ASSOCIATE
COMMISSIONER, EXAMINATIONS

Thomas W. Simmons, Chief
Administrative Appeals Unit

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

511 N.W. Broadway, Portland, OR 97209

REFER TO THIS FILE NO.

A27 100 882

Full Gospel Portland Church

4235 S.W. 107th

Beaverton, OH 97005 Date: Sep. 3, 1986

DECISION

Upon consideration, it is ordered that your Petition to Classify Preference Status of Alien on Basis of Profession or Occupation (Form I-140) be revoked for the following reasons.

SEE ATTACHED

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice. (18 days if this notice was received by mail). If no appeal is filed within the time allowed this decision is final. Appeal in your case may be mailed to:

Board of Immigration Appeals in Washington D.C. on the enclosed Form I-290 A. (A fee of $50.00 is required).

Regional Commissioner on the enclosed Form I-290 B. (A fee of $50.00 is required).

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office together with the required fee. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration

office nearest your residence or at the address shown in the heading to the letter.

Sincerely yours,

Carl. R. Houseman
District Director

cc: Mr. Richard L. Hendrie, Jr.
Attorney at Law

Enclosure I-129B
M-188

The petitioner has filed a Form I-140, Petition to Classify for Preference Status an Alien on the Basis of Profession or Occupation, for the classification of a beneficiary under Section 203(a)(3) of the Immigration and Nationality Act, as amended. That petition was approved on July 10, 1985. On March 20, 1986, notice was sent that the Service intended to revoke the approval of that petition. On May 5, 1986, the petitioner responded to that Intent to Revoke.

Section 203(a)(3) of the Act provides for such classification to:

(3)...qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or arts will substantially benefit

prospectively the national economy, cultural interests, or the welfare of the United States, and whose services in the professions, sciences or arts are sought by an employer in the United States.

Eligibility in this proceeding hinges on the definitions of the profession as that term is issued in section 203(a)(3). It has been held that to be recognized as a member of the professions, within the contemplation of section 203(a)(3) of the Act, two elements must be established: (1) that the beneficiary has a baccalaureate degree or the equivalent in the given field, and (2) that the attainment of such a degree or diploma is usually the minimum requirement for entry into the particular occupation. If the degree or diploma obtained by the individual equips him to enter an occupation for which the

attainment of such a degree is not a realistic prerequisite, that occupation may not be considered a profession. Matter of Ahmed, 12 I&N Dec. 498, (R.C. 1967), Matter of Asuncion, 11 I&N Dec. 660 (R.C> 1966) & Matter of Shin, 11 I&N Dec. 686 (D.D. 1966).

The beneficiary in this case will be a piano teacher/accompanist. Though the labor certification calls for the beneficiary to be able to teach at beginning, intermediate and advanced level, no evidence has been received to indicate that beneficiary has or is teaching at any but the beginning or introductory level. The petitioner's music school is unaccredited. The petitioner has failed to establish that music school, either church connected or independent, require a bachelor's degree

for teachers of beginning piano. The mere fact that the beneficiary may be, to a certain extent, broadly typified as a teacher does automatically establish professional standing. While the position of accompanist to a church choir requires the ability to play piano or other instruments and read music, it does not normally require a bachelor's degree in music. Nor is the applicant's salary in a range that would generally be considered professional. Accordingly, it is determined that petitioner has failed to establish that a bachelor's degree in music is a prerequisite for a piano teacher in an unaccredited music school and that the position in question is a profession within the purview of the Immigration and Nationality Act, as amended.

Furthermore, the petitioner has failed to establish that this is a bona fide job offer. The petitioning congregation has only 80 full members. The population it has elected to serve (Korean speakers living in the Portland Metropolitan Area) make up only a small percentage of the total population of the Portland Metropolitan Area. Furthermore, it is already served by at least eight other Christian churches plus several other non-Christian churches. For these reasons, the possibility of significant growth in either the Portland congregation or in the number of students attending the music school appears extremely remote. The size of the parent congregation in Korea or the denomination as a whole is not relevant. In addition, it is usual for a significant portion of children to discontinue their music lessons after a few months have gone

by. Therefore, it is reasonable to expect that membership in the school will decline after a few months. In view of the above, it is determined that the petitioner has failed to establish that this is a bona fide job offer.

In visa petition proceedings, it is incumbent upon the petitioner to prove that the beneficiary meets the requirements of the law. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). It is determined that you have failed to do so and that the beneficiary is not eligible for the benefit sought. The approval of this petitioner is therefore, revoked.

ATTACHMENT TO FORM I-292, A27 100 882, Dated September 3, 1986

SUPREME COURT OF THE UNITED STATES

No. A-149

Full Gospel Portland Church, et al.,

Petitioners,

v.

United States Department of Justice

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 16, 1991.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 28th
day of August, 1991.

THE EQUAL ACCESS TO JUSTICE ACT

5 U.S.C. § 504

28 U.S.C. § 2412

STATUTES INVOLVED

5 U.S.C. § 504. Costs and Fees of Parties

(a)(1). An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that

adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (1) no ex-

pert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorney or agents for the proceedings involved, justifies a higher fee.);

(B) "party' means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,0000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501)(c)(3) exempt from taxation under section 501(a) of such code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act [12 U.S.C. 1141j(a), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the

purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying

decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a) that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

(d) Fees and other expenses awarded under this subsection shall be paid by an agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The Chairman of the Administrative Conference of the United STates, after consultation with the Chief Counsel Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the contro-

versy, and any other relevant information which may aid the congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary to comply with the requirements of this subsection.

(f) No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986.

28 U.S.C. § 2412. Costs and Fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title [28 USCS § 1920], but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the

United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2417 of this title [28 USCS §§ 2414 and 2517] and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title [28 USCS §§ 2414 and 2517], except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in

any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonable

(sic) protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes the reasonable expenses of expert witness, the reasonable costs of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United STates; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an orga-

nization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501)(c)(3) exempt from taxation under section 501(a) of such code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act [12 U.S.C. 1141j(a)], may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position take by the United States taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978 [41 USCS §§ 601 et seq.];

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in an action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, [5 USCS § 504(b)(1)(C)], or an adversary adjudication subject to the Contract Disputes Act of 1978 [41 USCS §§ 601 et seq.], the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title [28 USCS § 604], the amount of fees and other ex-

penses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any cost, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 [26 USCS § 7430] applies (determined without regard to subsections (b) and (f) of such section [26 USCS § 7430(b), (f)]). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United STates Code [28 USCS § 2412(a)], of costs enumerated in section 1920 of such title [28 USCS § 1920](as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title [28 USCS § 1961], and shall run from the date of the award through the day before the date of the mandate of affirmance.

No. 91-494

In the Supreme Court of the United States

OCTOBER TERM, 1991

FULL GOSPEL PORTLAND CHURCH, ET AL., PETITIONERS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Equal Access to Justice Act, 28 U.S.C. 2412(d)(3), authorizes the award of attorney's fees for work performed in connection with administrative deportation proceedings conducted by the Immigration and Naturalization Service, on the theory that such proceedings are "adversary adjudication[s]".

2. Whether the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), authorizes the award of attorney's fees for work performed in such proceedings, on the theory that such proceedings are part of a "civil action."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-494

FULL GOSPEL PORTLAND CHURCH, ET AL., PETITIONERS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-32a) is reported at 927 F.2d 628. The opinion of the district court (Pet. App. 40a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 12, 1991. A petition for rehearing was denied on June 7, 1991 (Pet. App. 35a-36a). On August 28, 1991, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 16, 1991, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Full Gospel Portland Church employed petitioner Hae-Sook Kim, a native of Korea, as a choir director, piano teacher and accompanist. Pet. App. 5a. Petitioner Kim applied for visa preference status as a professional worker—a third category preference (see 8 U.S.C. 1153(a)(3)). Pet. App. 5a, 6a n.1. Her application was initially approved by the District Director of the Immigration and Naturalization Service, but the approval was subsequently revoked, and her preference status petition was denied. *Id.* at 5a.

Petitioner Full Gospel moved to reopen and reconsider the denial of the original petition; it also submitted a new petition requesting that Kim be given a sixth category preference pursuant to 8 U.S.C. 1153(a)(6).[1] Pet. App. 5a-6a. Without acting on Full Gospel's requests, INS commenced deportation proceedings against Kim in November 1987. *Id.* at 6a. In February 1988, petitioners commenced the instant action in district court. *Ibid.*

On October 17, 1988, the district court issued a memorandum opinion and order concluding that INS had improperly refused to grant petitioner Kim a preference visa (Pet. App. 63a-101a), and directing it "to consider and to abide by [the court's] determinations * * * as to [petitioner Kim's] visa petitions in any matter relating to adjustment of [her] status." *Id.* at 103. Petitioners then moved for attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d), for the district court proceedings and

---

[1] This preference status is available to qualified immigrants capable of performing skilled or unskilled labor for which a shortage of employable and willing persons exists. Pet. App. 8a n.1.

for the INS administrative proceedings both before and after the civil action. Pet. App. 7a. On October 4, 1989, the court granted the fee motion. *Id.* at 7a, 40a-48a. The award for the administrative proceedings was $12,334.79, including fees for 106 hours spent in pre-litigation visa proceedings and the deportation hearing, and 13 hours spent in post-litigation proceedings relating to the adjustment of petitioner Kim's status. *Id.* at 8a-9a.

The government appealed the district court's award of fees for the administrative proceedings, and the D.C. Circuit reversed the entire administrative fee award in a *per curiam* opinion. Pet. App. 4a-21a. The court held that an EAJA fee award is not available pursuant to 28 U.S.C. 2412(d)(3) for administrative deportation proceedings, because those proceedings are not "adversary adjudication[s]." Pet. App. 9a-11a.[2]

The court also rejected petitioners' argument that under *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), they are entitled to recover EAJA fees for the pre-litigation administrative proceedings pursuant to 28 U.S.C. 2412(d)(1)(A). The court held that acceptance of petitioners' interpretation of the statute "would nullify the limitations Congress placed on fee awards

---

[2] EAJA permits a court to award attorney fees for both the civil action and the related agency proceedings to a party who prevails on judicial review of an administrative proceeding that is an "adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code." 28 U.S.C. 2412(d)(3). "[A]dversary adjudication" is defined in 5 U.S.C. 504(b)(1)(C) as an "adjudication under [5 U.S.C.] section 554." Section 2412(d)(3) thus tracks 5 U.S.C. 504, providing for the award of fees by the agency itself. Under both provisions, fees are available only for "adversary adjudication[s]."

for administrative proceedings" (Pet. App. 12a), since petitioners' interpretation would "override 28 U.S.C. § 2412(d)(3), the judicial review EAJA provision allowing fees only for adversary agency adjudications to parties who eventually prevail in court." Pet. App. 13a; *id.* at 22a, 29a (R.B. Ginsburg, J., concurring).

Finally, the court held that petitioners are not entitled to fees for the 13 hours spent in administrative proceedings subsequent to the district court's final judgment on the merits. Pet. App. 13a-21a. The court again rejected petitioners' reliance upon *Hudson*. The court stated that for the *Hudson* rationale to apply, "there must be a remand by the reviewing court and 'detailed provisions for the transfer of proceedings from the courts to the [agency],' which would implicate 'a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the [APA],' * * * before the award of fees can be even considered." *Id.* at 18a, quoting *Hudson*, 490 U.S. at 885.

Judge Ruth B. Ginsburg dissented in part, contending that plaintiffs should receive fees for administrative proceedings that occurred subsequent to the district court's ruling on the merits. Pet. App. 22a-32a.

ARGUMENT

1. As petitioners recognize, the first issue upon which they seek certiorari is identical to that in *Ardestani* v. *INS*, No. 90-1141 (argued Oct 8, 1991).[3] Accordingly, with respect to question 1 presented in the petition for certiorari, the petition should be held pending the Court's decision in *Ardestani*, and should then be disposed of in light of that decision.

2. Alternatively, petitioners argue, citing *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), that they are entitled to an award of EAJA fees for the pre- and post-litigation INS administrative proceedings under 28 U.S.C. 2412(d)(1)(A) on the theory that those proceedings are part of a "civil action." The court of appeals correctly rejected this argument, and the court's holding does not conflict with any decision of this Court or any other court of appeals. Accordingly, certiorari should be denied with respect to questions 2 and 3 of the petition.

Hudson held that under the "unusual" statutory scheme at issue in that case—the scheme governing post-remand Social Security disability benefits proceedings—EAJA fees were available even though the administrative proceedings were non-adversarial, because those proceedings are "so intimately connected with judicial proceedings as to be considered part of the 'civil action' for purposes of a fee award." 490 U.S. at 885, 892. But the Court emphasized that the

---

[3] In addition to the circuits cited in the petition (Pet. 22), three other circuits have recently decided this issue adversely to petitioners' position. *Hashim* v. *INS*, 936 F.2d 711 (2d Cir. 1991), petition for cert. pending, No. 91-207; *Hodge* v. *United States Dep't of Justice*, 929 F.2d 153 (5th Cir. 1991), petition for cert. pending, No. 91-83; *Escobar* v. *INS*, 935 F.2d 650 (4th Cir. 1991).

Social Security statutory scheme required "a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act," because the statutory provision granting judicial review contained "detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court." *Id.* at 885. Thus, the administrative proceedings on remand were "wholly ancillary to a civil action for judicial review" and "necessary to the completion of a civil action" (*id.* at 892). See *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2162 (1991) (*Hudson* "stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level" (citing *Hudson*, 490 U.S. at 892)). The instant case does not satisfy the *Hudson* criteria.

a. As the court below unanimously recognized (Pet. App. 11a-13a, 22a, 29a), there is no merit to petitioners' attempt, on the authority of *Hudson*, to read 28 U.S.C. 2412(d)(1)(A) to authorize EAJA fee awards for pre-litigation administrative proceedings not covered by 28 U.S.C. 2412(d)(3). Accord *Pollgreen* v. *Morris*, 911 F.2d 527 (11th Cir. 1990) (attorney hours spent in non-adversary administrative proceeding prior to the filing of the action in federal court are not reimbursable).

Hudson manifestly did not suggest, as petitioners contend (Pet. 25), that whenever a party must exhaust administrative remedies before seeking judicial relief, the administrative process is "intimately tied"

to the civil action. Indeed, such a holding would read the "adversary adjudication" requirement of 28 U.S.C. 2412(d)(3) out of the statute. But Congress specifically provided in 28 U.S.C. 2412(d)(3) that EAJA fees are available only for administrative "adversary adjudication[s], as defined in [5 U.S.C.] 504 (a)(1)." Petitioners' interpretation of *Hudson* is at odds with both the principle of strict construction of waivers of sovereign immunity (see, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986)) and "the established principle that a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990).

In essence, petitioners make a policy argument that ignores the language and structure of EAJA, a limited waiver of sovereign immunity. Petitioners evidently believe that EAJA should be expanded to apply to all administrative proceedings. But that is not the statute Congress enacted, and the relief petitioners seek can come only from Congress. *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 451 (D.C. Cir. 1989) ("[i]t is, of course, the province of Congress, not this court, to determine whether EAJA * * * should be amended"). Since the court of appeals' unanimous holding on this point does not conflict with *Hudson*, or with the decision of any other court of appeals, petitioners' argument does not warrant further review by this Court.

b. Nor is there merit to petitioners' claim that *Hudson* supports an award of fees for the 13 hours spent by their attorneys in administrative proceedings that occurred subsequent to the district court's decision on the merits.

Hudson holds only that fee awards are available for administrative proceedings on remand in benefits liti-

gation under a statutory scheme that provides the court with continuing jurisdiction over post-remand proceedings. 490 U.S. at 892. The Court specifically distinguished cases in which the district court acts, as under the Administrative Procedure Act, "'in [its] accustomed role as external overseer[] of the administrative process'" (*id.* at 885; citation omitted). In contrast, in this case, had INS refused to adjust petitioner Kim's status, the district court could have reviewed that decision only under the APA—the very statute distinguished by the Court in *Hudson*.

In *Pollgreen* v. *Morris*, *supra*, the Eleventh Circuit held that, in the particular circumstances of that case, the INS administrative proceedings for assessing fines and seizing vessels were intertwined with the plaintiffs' civil action, and therefore EAJA fees were available for post remand proceedings under 28 U.S.C. 2412(d)(1)(A). The court of appeals correctly disagreed with the *Pollgreen* court's view that *Hudson* is not limited to statutory schemes like the Social Security Act, where the reviewing court and the agency act as "[virtual] co-participants in the [administrative] process." *Hudson*, 490 U.S. at 885.

In any event, the court of appeals here correctly observed that *Pollgreen* more closely resembled *Hudson* than does the instant case, since in *Pollgreen* there were two remands from the court to the agency and the court retained continuing jurisdiction over the case, whereas here the district court never remanded the case and did not retain continuing jurisdiction over post-judgment administrative proceedings. Pet. App. 16a n.3. In the instant case, therefore, unlike both *Hudson* and *Pollgreen*, there was no remand that could create the "requisite ancillary relationship" between the civil action and the post-judgment ad-

ministrative proceedings. *Pollgreen*, 911 F.2d at 535; see also *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2666 (1990) (discussing *Hudson* as a case involving a remand). Thus, in view of the court of appeals' alternative holding that petitioners do not satisfy "even [*P*]*ollgreen's* * * * tests" (Pet. App. 17a), and the absence of any indication that the Eleventh Circuit would disagree with that conclusion, there is no square conflict between this case and *Pollgreen*.

CONCLUSION

With respect to question 1, the petition for a writ of certiorari should be held pending the Court's decision in *Ardestani* v. *INS*, No. 90-1141 (argued Oct. 8, 1991), and thereafter disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
JOHN S. KOPPEL
Attorneys

OCTOBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312-324 45117